Supreme Court, U. S.
FILED
OCT 14 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

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October 15, 1976

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RECORD REFERENCES

Reference will be made to the proceedings below by symbol, as follows:

Cert. App.	refers to the printed Appendix accompanying the Petition for Certiorari in this Court.
T	refers to the typewritten transcript of trial proceedings.
A	refers to the printed Appellants' Appendix of 114 pages in the court below.
SR	refers to the printed Supplemental Record of 521 pages in the court below.
Arms Ex.	refers to Exhibits offered by Mr. and Mrs. Charles S. Arms, who, in response to the trust construction suit filed by the Trustees, entered appearance as Petitioners.
Trustees Ex.	refers to Exhibits offered by the Trustees.
B-N Ex.	refers to Exhibits offered by Burlington Northern Inc.

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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

Now come Charles S. Arms and Elizabeth P. Arms, Petitioners, and pray that this Court issue its writ of certiorari to bring here for review the judgment of the Supreme Court of Minnesota in Causes Nos. 44775 and 44776 on its docket.

OPINIONS

The opinion of the Supreme Court of Minnesota, by Mr. Justice Peterson, is reported in ___ Minn. ___, 243 N.W.2d 302 and is reproduced in the Appendix hereto, printed under separate cover. (Cert. App. 1.)

The opinion of the district court, Second Judicial District of the State of Minnesota, sitting in St. Paul, by Judge

Segell, is not reported, but is reproduced in the Appendix hereto. (Cert. App. 13.)

JURISDICTION

The judgment of the Supreme Court of Minnesota is dated and was entered April 23, 1976 (Cert. App. 1, 12, 66); the order on rehearing was dated and entered July 19, 1976. (Cert. App. 12.)

This Court has jurisdiction to review under 28 U.S.C. 1257 (3) and 2101(c).

QUESTION PRESENTED

This case presents the question:

Whether the Minnesota Supreme Court judgment misconstrues and violates the Commodities Clause of the Hepburn Act, 49 U.S.C. §1(8) in ordering vast iron ore lands on the Minnesota Mesabi Iron Range (which were placed in trust in 1906 by James J. Hill for the benefit of holders of trust certificates of interest originally issued to the stockholders of Great Northern Railway, of which Hill was the executive head and principal stockholder, one such certificate for each share of stock, and presently held by approximately 10,000 persons, corporations, and other holders, because he considered Great Northern Railway, one of the two major haulers of Mesabi ore, barred by the Hepburn Act from having "*any* interest, *direct or indirect*" in the Mesabi mines) to be conveyed upon the termination of the trust, to Burlington Northern, Inc., which, as successor to the business and interests of Great Northern Railway, is subject to the same Hepburn Act bar as was Great Northern, or whether such conveyance is compatible with the Hepburn Act.

STATUTE INVOLVED

This case turns on the Commodities Clause of the Hepburn Act, enacted June 29, 1906, effective June 1, 1908, Ch. 3571, §1, 34 Stat. 584, now codified in the form in which it was enacted as 49 U.S.C. §1(8). The statute, with the portions thereof now relevant italicized, says:

> "It shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, *mined, or produced by it, or under its authority*, or which it may own in whole or in part, or *in which it may have any interest, direct or indirect*, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."*

STATEMENT OF THE CASE

This case concerns the ownership of vast iron ore lands on the Mesabi Iron Range in Minnesota, now held in trust.

These properties will go either to the approximately 10,000 certificate holders upon the termination of the Trust, or to Burlington Northern, Inc., successor to, and subject to the Hepburn Act restrictions imposed upon, the Great Northern Railway, of which James J. Hill was the driving wheel.

—The Origin of the Trust

James J. Hill, the Empire Builder, and his son, personally acquired in the period 1897-1906 interests in 65,000 acres of iron ore lands on the Mesabi Iron Range. (Cert.

---

*Emphasis supplied throughout except as otherwise noted.

App. 2, 18-27, 34, 54.) Title to the ore lands or interests therein, was held by corporations, the stock of which Hill bought. (Cert. App. 17-19.)

Hill faced a dilemma.

His interest in the ore lands was in the freight revenue the mining of the ore would generate for Great Northern in hauling the ore to the iron ore ports at the head of the Great Lakes. (Cert. App. 36, 40-41, 55, 57.) He recognized, the trial court found, that Great Northern could not hold ore lands, or stock in the companies that owned the lands, because of limitations in its charter (Cert. App. 43-44, 57), restrictions in the Minnesota statutes (Cert. App. 44-45), prohibitions of the Interstate Commerce Act (Cert. App. 45), decisions of this Court (Cert. App. 45, 48-49), the personal philosophy of James J. Hill, who saw in any attempt by the railway or those connected with it to mine the ore and transport it to market, a conflict of interest (Cert. App. 46-47), and—what for present purposes is important—the restrictions of the Commodities Clause of the Hepburn Act. (Cert. App. 45-46, 58.)

—The Royal Gift

Hill's solution was the "Royal Gift." (SR 198.) This was effected by:

1. *Transfer of the properties to Lake Superior Company, Limited,* formed on July 25, 1899, as a Michigan limited partnership association, by James J. Hill, his son, James N. Hill, and Robert I. Farrington, his close business associate, then Comptroller for Great Northern and later its Vice President. (Cert. App. 2, 24.) The properties (stock in companies that owned the ore lands) were conveyed to Lake Superior Company, Limited, pursuant to contract of October 20, 1899. (Cert. App. 2, 24, SR 110.) James J. Hill explained: "I turned them over to a company known as the Lake Superior

Co., to hold them in trust for the shareholders" of Great Northern. (SR 8.) However, this was a temporary disposition—until plans could be formulated for a permanent solution of the problem. The trouble was that "This trust, the Lake Superior Company Trust, would expire in about ten years" whereas "the mining of these ores would run over a great many years * * *." And so, "the trustees were changed." (Knutson Legislative Committee Hearings of February 14, 1907, SR 80.)

2. *Formation of the Trust in Suit.* The original Trustees were James J. Hill's sons, Louis W. Hill, and Walter J. Hill, his son-in-law James N. Hill, and Edward T. Nichols, Third Vice-President, Assistant Treasurer, and Secretary of Great Northern. (Cert. App 14.) Lake Superior Company, Limited, conveyed all of the securities representing ore properties to the Trustees, and the Trustees in turn issued 1,500,000 shares of participating interest in the Trust: one share in the Trust for each share in Great Northern Railway Company. The Trust Agreement specified (A-8, ¶ 5) that "each original beneficiary" would receive a certificate evidencing his interest in the Trust "equal to the number of shares of stock of the Great Northern Railway Company" registered in his name on the books of the company at the close of business on December 6, 1906. (Cert. App. 3.) The certificates of interest are listed on the New York Stock Exchange (Cert. App. 3) and have been since 1910 (T 18), and are freely traded. (SR 486.) As of April 20, 1973, the latest date shown in the Record, there were 9,637 holders of certificates of interest, the smallest holding being a single share, the largest 166,682, and the mean: 156. (Trustees' Answer to Arms Interrogatory 33.)

The trust device thus accomplished Hill's purposes: (1) it relieved him, and the railroad, of violations of law, including the Commodities Clause of the Hepburn Act,

and the conflict of interest that would arise were it, or persons connected with the railroad, to own the property or any interest therein, or mine the ore the railroad would haul to market; and (2) it provided assurance that Great Northern Railway would get the freight business—which was the basis of Hill's interest in the ore lands.

The trial court so found. (Cert. App. 40, 44-46.)

The last of the separate companies that held the ore lands was liquidated in 1956 and its properties, along with all the others, passed to the Trustees. (SR 246-247.)

(1) The Natural Ore Has Ended

James J. Hill, in the period 1903-1908, when mining of the Mesabi was just beginning, estimated there were about 500 million tons of natural ore on the property. (Cert. App. 35.) The subsequent 67 years of mining was to prove the accuracy of this estimate. A total of "457,605,-775 tons of ore had been mined from the iron ore properties held by the Trust" through 1972, and approximately 15,923,681 tons then remained. (Cert. App. 35.) Hill hit within 95% of the total tonnage of iron ore the properties were to yield.

The natural ore has now been exhausted. The last mine, the Mahoning, closed in August, 1973. (Cert. App. 35.) However—

(2) Vast Reserves of Taconite Remain

The Trust properties today contain immense reserves of taconite. (Cert. App. 8, 35-36, 49-50, 61-63.) Plants representing an investment of hundreds of millions of dollars have been built to recover iron from the taconite. (Cert. App. 49.)

The trial court found:

> "At the present time the Trustees have 381,657,132 tons of commercially mineable taconite committed to present plants. In addition, the Trustees have leased lands containing 159,320,838 tons of magnetic taconite which are not under lease. Of the tonnage that is committed to present plants, it is estimated that it will take approximately sixty years to mine it. Of the tonnage that is not committed to present plants, there is no way of foreseeing when this tonnage might be mined, and this is similarly true of the tonnage which is not under lease. [Arms Exhibit 64]
>
> In addition to the foregoing tonnages, there is possibly an equivalent tonnage of magnetic taconite that is not commercially mineable today. The reason for this is that it is not economically feasible to mine such taconite when it lies under such a thick overburden of both raw earth and non-magnetic taconite layers. [Arms Exhibit 64]
>
> Besides the magnetic taconite, there is a vast tonnage of taconite 'sometimes in layers above or below the magnetic taconite,' which is referred to as non-magnetic taconite; however, while there are known metallurgical methods to recover it, there are no commercial plants to treat it. It is estimated that the trust properties might contain as much non-magnetic as magnetic taconite." (Cert. App. 49-50.)

—The Proceedings Below

The question below was who would get these vast properties upon the termination of the Trust.

The certificate holders?

Or Burlington Northern—which stands in the shoes of, and is subject to the same Hepburn Act limitations as, Great Northern?

The Trustees brought suit for instructions. (Cert. App. 2, A-1.)

(i) The Trial Court's Holding

The trial court held the trust properties could not be conveyed to Burlington Northern. It is one of the two principal haulers from the Mesabi. To give it an interest,

direct or indirect, as the statute puts it, in the ore lands would put it in violation of the Hepburn Act. (Cert. App. 9.) The trial court worked it out this way:

> "the Interstate Commerce Act was a vehicle standing in the way of the Great Northern Railway's transportation of commodities owned by it. Even before the enactment of the Commodities Clause of the Hepburn Act, the Interstate Commerce Commission had held in *Grain Rates of Chicago, Great Western Railway Company,* 1897, 7 Interstate Commerce Reports 33, that it was a violation of the Interstate Commerce Act for a railroad to transport commodities owned by it; that doctrine was upheld before the United States Supreme Court in *New York, New Haven and Hartford Railway Company vs. Interstate Commerce Commission,* 1906, 220 U.S. 361.
>
> On June 29, 1906, an amendment was passed to the Interstate Commerce Act which, in this litigation, has become familiarly known as the Commodities Clause of the Hepburn Act; that legislation made it unlawful for a railroad to transport, except for use in its own business, any commodity:
>
> '*mined or produced by it* or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect . . .' [Emphasis the Court's] Ch. 3591, Stat. 584, Section 1.
>
> James J. Hill was cognizant of this statute and cognizant of the fact that the railroad could not own ore property directly or indirectly if it wished to garner the iron ore freight revenues." (Cert. App. 45.)

The trial court found further:

> "If, as is now suggested by Burlington Northern, its predecessor, the Great Northern, originally had and subsequently maintained control over the ore properties, temporarily parted with possession of them, but continued to have a legal, vested reversionary interest in them, then such clauses injected into the leases executed by the Trustees of Great Northern Iron Ore Properties Trust, tying the traffic to the Great Northern Railway, were plainly illegal, because they were violations of 1] the Commodities Clause of the Hepburn Act, 2] the Interstate Commerce Act, and 3] the tenor of the United States Supreme Court cases covering such matters; moreover, they would also have violated the Charter of the Great Northern. It is clear that *the railroad had to be completely divorced from the ore properties at all times and remain divorced therefrom* in order not to violate the laws of the United States and its Charter. After all, as Burlington Northern notes in its reply brief at page 40: 'The Commodities Clause [of the Hepburn Act] enacted in 1906 remains unchanged to this day.'" (Cert. App. 57-58.)

The trial court added:

> "Taconite became a commercial product in the mid-1960's, and it has been determined that there are millions of tons of taconite to be mined out of the ore properties in question, which will take perhaps one hundred years or more. Burlington Northern, of course, looks upon this as a windfall which was contemplated by the trust. The settlor's intent was quite to the contrary. Whatever of value was in the lands was to belong to the certificate holders. The mining of taconite was never dreamed of at the time of the execution of the trust, and even as late as 1951, when there was no taconite income, the Trustees in their report to the certificate holders indicated that commercial production would not be started for many, many years, and that the experimental stages in commercial production which had been conducted for some time would continue for years before the mining of taconite would be commercially feasible. [Arms Exhibit 65, Report of 1951]
>
> The idea of a windfall to Burlington Northern is a concept of very recent origin and one which was undoubtedly conceived as a result of the proceedings

herein. Neither Burlington Northern nor its predecessor, Great Northern, had ever contemplated that the reversion would have any commercial or monetary value. *They had never referred to it in their records, never shown it in any way in their books of account, and had never placed any value upon it either prior or subsequent to the commercial production of taconite.* [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Moreover, Burlington Northern and its predecessor, Great Northern, recognized that under the laws of the United States *as they were at the time of the execution of the trust and at all times since that time, the railway could never become the owner of commercially mineable ore properties, even if it did not intend to transport them over its railway.*" (Cert. App. 61-62.)

(ii) Trust Created Because of Hepburn Act

It was the enactment of the Hepburn Act on June 29, 1906, that led to the creation of the Trust. To be sure, the Commodities Clause was not to become effective until June 1, 1908.

But there it was.

And the statute had to be faced.

Asked on the trial by Burlington Northern to state the purpose of the Trust (Burlington Northern Interrogatory 6), the Trustees responded:

> "(a) To enable Great Northern Railway to avoid the consequences of the Commodities Clause."

Frank Claybourne, counsel for the Trustees, told the trial court:

> "There was a Hepburn Act passed back in 1906 with a Commodities Clause in it preventing a railroad from hauling things like iron ore from its own mines or its own properties. *They wanted to divorce the railroad from hauling their own properties.*" (T 149.)

Francis D. Butler, also counsel for the Trustees, assured the trial court:

> "there is no doubt but that *if it weren't for the Commodities Clause this Trust would not exist.* The Commodities Clause said that no railroad could carry any product of mines which it owned or product of plants which it owned over its lines." (T 167.)

James J. Hill was in no doubt. He knew that, in view of the statute, the railroad could not own ore property, directly or indirectly, then or in the future, if it wished to reap the benefit of iron ore freight revenues. He testified in the Congressional hearing:

> "THE CHAIRMAN: You do not claim that the Great Northern Railway Co., under the present interstate commerce act, could own and operate the Mahoning mine as a merchant mine?
>
> MR. HILL: I have just said it could not.
>
> MR. GARDNER: That is what I meant in asking whether it was a Federal law.
>
> THE CHAIRMAN: That *would be clearly within the commodities clause* of that act." (SR 16-17.)

It was the Hepburn Act, Judge Donovan concluded in *Hill v. Reynolds* (D.C. Minn., 1948), 75 F. Supp. 408, that barred Great Northern from ownership of the ore properties. The court said:

> "The trust, no doubt, at the time of its creation was conceived by those in control of the Great Northern Railway Company for the purpose of divorcing holdings of natural resources from the Railway Company, so as to comply with the Hepburn Act passed by Congress in June, 1906, 49 U.S.C.A. § 1 et seq." 75 F. Supp. at 412.

On appeal in *Reynolds v. Hill* (8th Cir., 1950), 184 F.2d 294, the court ruled:

"The setting and circumstances present the picture of large interrelated holdings of mineral lands, which had been amassed for the purpose of making additional earnings for the stockholders of the Great Northern Railway Company and of being the source of hauling revenues for the Railway itself. On such a control of natural resources by a carrier, Congress in 1906 laid its restraining hand, through the enactment of the Hepburn Act, 49 U.S.C.A. § 1(8), and the Great Northern Railway was faced with the situation of having to divorce itself from connection with these holdings." 184 F.2d at 297-298.

(iii) The Holding of the Minnesota Supreme Court

The Supreme Court of Minnesota reversed the judgment of the trial court. (Cert. App. 66.)

In face of the Hepburn Act, the Minnesota Supreme Court ordered the properties *"returned"* to the railroad (Cert. App. 11)—which had never owned them in the first place (Cert. App. 32-33, 54), or claimed any interest therein until this suit was brought. (Cert. App. 32-34, 62.)

The Minnesota Supreme Court recognized (Cert. App. 9) that the Hepburn Act made it unlawful for Great Northern (and whatever rights Burlington Northern has it must trace through Great Northern) to transport iron ore in which it has *"any"* interest, "direct *or* indirect." The Minnesota Supreme Court (Cert. App. 9) thought it "not clear" that the Railroad would have been deemed to have an "interest" in the ore—forgetting that, whatever the interest, the Commodities Clause was a bar.

This holding, relied upon by the Minnesota Supreme Court to escape the Hepburn Act, falls in face of that court's adjudication that the Railroad *does have* an interest in "the properties." The "properties," the court held, *must be returned* to the Railroad. (Cert. App. 11.) A clearer adjudication of "interest", or a more flagrant misconstruction of the Hepburn Act, it is difficult to imagine.

The Railroad's interest in these properties the Minnesota Supreme Court in addition, confirmed, by holding that Lake Superior Company (which owned and controlled the ore mines) was *"the instrumentality of Great Northern."* (Cert. App. 10.)

What the Minnesota Supreme Court thought "not clear" (Cert. App. 9) it adjudged clear. (Cert. App. 11.)

The Minnesota Supreme Court worked it out this way:

"The Commodities Clause of the Hepburn Act, now 49 U.S.C.A., § 1(8), upon which the court particularly focused, *prohibits* a railroad from carrying ore mined or produced by it *or under its authority* or in which it may have *any* interest, direct *or* indirect. *It is not clear* that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for *it is not clear* that it would have been deemed to have *any interest* in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust." (Cert. App. 9.)

The Minnesota Supreme Court conceded:

"the trust instrument executed on December 7, 1906, states that Lake Superior holds the property 'for the benefit of the shareholders of the Great Northern Railway Company.'" (Cert. App. 11.)

The Minnesota Supreme Court then demonstrated, ineluctably, the violation of the Commodities Clause of the Hepburn Act in its further holding that:

"In 1913 Great Northern succeeded to Lake Superior's interest in the trust, and Burlington Northern has since succeeded to Great Northern's. Any *property*

returned to Burlington Northern by the trustees would therefore be held only for Burlington Northern's own benefit." (Cert. App. 11.)

Thus, although the Hepburn Act denies to Burlington Northern, one of the two principal haulers from the Mesabi, *any* interest *"direct or indirect,"* the statute is held no bar because it "is not clear" whether the railroad has an interest in the properties the court ordered *"returned" to it.*

REASONS FOR GRANT OF THE WRIT

1. The Minnesota Supreme Court has misconstrued the Commodities Clause of the Hepburn Act and thereby despoiled the approximately 10,000 certificate holders of property that but for the misconstruction would come to them. Despite the Hepburn Act's prohibition of *"any"* interest, "direct *or indirect*" the Minnesota Supreme Court held it "not clear" that such a prohibited "interest" would exist notwithstanding it ordered the ore lands conveyed to the railroad.

If such "interest" be "not clear" then is the Hepburn Act denuded of meaning.

2. This Court has not looked at the Commodities Clause of the Hepburn Act for 28 years and what it then ruled does not justify the Minnesota Supreme Court's interpretation of the statute. This Court early shaped the statute in a direction at variance with the construction given the statute by the Minnesota Supreme Court in this case. This is illustrated by:

> *Delaware, Lackawanna and Western Railroad Company v. United States* (1913), 231 U.S. 363, where the Court in an opinion by Mr. Justice Lamar held the Commodities Clause (p. 370) is "a constitutional exercise of a governmental power intended to cure or prevent the evils that

> might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper," and that the statute (p. 370) "applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."
>
> *United States v. Reading Company* (1920), 253 U.S. 26, where the Court in an opinion by Mr. Justice Clarke held (p. 60) "The purpose of the commodity clause was to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper."

In 1936 and 1948, however, in a pair of cases, *United States v. Elgin Joliet & Eastern Railway Co.* (1936), 298 U.S. 492, and *United States v. South Buffalo Railway Co.* (1948), 333 U.S. 771, the Court, over sharp dissents, put some play in the words of the Commodities Clause—but *not* enough to justify the construction given the statute by the Minnesota Supreme Court.

Both of those cases involved short-line railroads connecting industrial plants with main-line carriers.

Elgin, 298 U.S. 492, dealt with the Chicago Outer Belt Line, owned by United States Steel Corporation. It had 195 miles of track and carried the products of the steel mills (p. 497) to "every railroad entering Chicago". *South Buffalo*, owned by Bethlehem Steel, provided a like service to the Bethlehem Steel Works in the Buffalo area. It supplied (333 U.S. at 773) "the sole terminal connection between this industry and the trunk-line railroads. It operates about 6 miles of main-line track and 81 miles of spur

track, 58 miles of its trackage being on leased right-of-way within the steel plant where it connects with other trackage owned by the Steel Company itself."

In *Elgin* Mr. Justice McReynolds, writing for the Court, was sharply challenged by Justices Stone, Brandeis and Cardozo. The dissenting Justices took the view that the statute:

> "is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult." 298 U.S. at 506.

The *South Buffalo* case was decided on the authority of *Elgin* and the asserted failure of Congress to challenge the *Elgin* decision. The Court, in *South Buffalo,* speaking through Mr. Justice Jackson, observed:

> "It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." 333 U.S. at 774.

Justices Rutledge, Black, Douglas and Murphy dissented. They considered:

> "This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it the unjustified inference that Congress approves the mistake. I think that *United States v. Elgin, Joliet and Eastern R. Co.,* 298 U.S. 492, was decided in the teeth of the commodities clause, 49 U.S.C. § 1(8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one." 333 U.S. at 785-786.

In their view:

> "Only by the most sophisticated, or unsophisticated, process of reasoning can it be concluded that any one of the many subsidiary members of this integrated steel-producing empire has no interest in the operations of every other member." 333 U.S. 786-787.

Two points need to be noted:

First: the principle on which the *Elgin* and *South Buffalo* short-line cases were held clear of the Commodities Clause of the Hepburn Act cannot reasonably apply to a multi-state trunk-line carrier such as Burlington Northern.

Second: here is opportunity to reexamine the construction given the Commodities Clause in the short-line cases, which seven Justices of this Court have condemned, and to correct the misconstruction given the statute by the Minnesota Supreme Court which erodes the statute out of existence.

CONCLUSION

The Minnesota Supreme Court has misconstrued the Hepburn Act, an important federal statute, and stripped it of meaning. But for that misconstruction the Minnesota Supreme Court could not have taken the Mesabi lands from the nearly 10,000 certificate holders and ordered that when the Trust ends these lands be "returned" to Burlington Northern, although neither it nor its predecessor, Great Northern, ever owned them. (Cert. App. 32-33.)

In all of the 66 years of the Trust, until this suit was brought, neither Great Northern Railway nor Burlington Northern Inc. has shown any value on its books for any interest in the Trust-held property. (Cert. App. 34, 62; B-N Admissions 1(x) and (y); SR 328.) Neither Great Northern nor Burlington Northern has so much as hinted in any report to shareholders or in any published statement in all of the 69 years of the Trust that it has any interest whatever in any of that property. (Cert. App. 34, 62; B-N Admissions (z) and (aa); and response 1(bb); SR 328.)

Even in the proxy statements issued in connection with the March 2, 1970, merger that brought Burlington Northern Inc. into being, neither Great Northern nor any constituent company so much as listed, even by description, an interest in the Trust-held property. (T 418-419.) Nor have the Trustees ever carried a value on their books for any interest of Great Northern or Burlington Northern in the Trust assets. (Trustees' Answer to Arms Interrogatory 18: SR 507-508.)

The misconstruction of the Hepburn Act, but for which the Minnesota Supreme Court could not have ruled as it did, deserves the attention of this Court.

Respectfully submitted,

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October 15, 1976

Supreme Court, U. S.
FILED
OCT 14 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR., HARRY L. HOLTZ, JOSEPH S. MICALLEF, *Trustees of the Great Northern Iron Ore Properties Trust,*
BURLINGTON NORTHERN, INC.,
Respondents.

ARMS APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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October 15, 1976

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OPINION OF SUPREME COURT OF MINNESOTA

(April 23, 1976, Rehearing Denied July 19, 1976)

..... Minn. ....., 243 N.W.2d 302

Nos. 44775, 44776

SUPREME COURT OF MINNESOTA

IN RE TRUST KNOWN AS GREAT NORTHERN IRON ORE PROPERTIES

Syllabus by the Court

In its construction of an express trust which was limited to a term measured by the lives of 18 named people (some of whom are still living) plus an additional 20 years, and which provided that upon termination all property other than money should be returned to the settlor, the findings of the district court that the trust should be immediately determined and that the successor in interest of the settlor had no interest in the trust were clearly erroneous.

Doherty, Rumble & Butler, Francis D. Butler and Jack C. Foote, Frank Claybourne and Perry M. Wilson, Jr., St. Paul, for Great Northern Iron Ore Prop.

Briggs & Morgan, J. Neil Morton, Richard E. Kyle, Steve A. Brand, Frank S. Farrell, Richard V. Wicka, St. Paul, and Kurt W. Kroschel, Billings, Mont., for B. N. Inc.

Oppenheimer, Wolff, Foster, Shepard & Donnelly, James R. Oppenheimer and John H. Wolf, St. Paul, Arter & Hadden and Thomas V. Koykka, Keith Benson and David G. Coleman, Cleveland, Ohio, for Arms, et al.

Considered and decided by the court en banc.

PETERSON, *Justice.*

The trustees of a trust known as Great Northern Iron Ore Properties petitioned the district court for instructions as to their powers and duties with respect to the conversion of the assets of the trust to cash.[1] The trust instrument directs that upon termination of the trust the trustees shall convey all remaining money to the beneficiaries and convey all other property back to the settlor or to its successor. The petition was prompted by a dispute between certain owners of the beneficial interest of the trust and the successor in interest of the settlor.[2] The district court did not give the requested instructions but, instead, declared the trust terminated and ordered that the trust assets be transferred to a corporation to be owned by the beneficiaries. We reverse and remand for further proceedings to permit the instructions for which the trustees petitioned.

Near the turn of the century, James J. Hill and others acquired stock in several companies which owned iron ore properties in Minnesota. Hill caused the stock in these mining properties to be transferred to the Lake Superior Company, Limited (hereafter Lake Superior), a Michigan partnership composed of Hill and some of his associates, and on October 20, 1899, Lake Superior entered into a contract with Great Northern Railway (hereafter Great Northern). By this contract Lake Superior

1. The trustees additionally petitioned for confirmation of their appointment and allowance of their accounts. These were confirmed and allowed and are not now in issue.

2. Several parties intervened, principally appellant Burlington Northern, Inc., and respondents Charles S. and Elizabeth P. Arms. Burlington Northern is the successor in interest of the settlor of this trust. Respondents Arms are two of the holders of the certificates of beneficial interest in the trust. They do not represent the interests of any of the other approximately 10,000 certificate holders.

"in consideration of" and "as a condition [of]" the transfer of property to it, agreed not to sell any of the property without the approval of Great Northern and agreed that, when directed by Great Northern, it would pay the net income from that property to the shareholders of Great Northern as they appeared of record for regular dividend purposes. Lake Superior agreed, in addition, that Great Northern could direct it in the acquisition of new property and that, at Great Northern's direction, Lake Superior would transfer the property to whomever Great Northern, upon majority vote of Great Northern stockholders, should at any time designate.

Great Northern, by resolution passed by its directors and approved by its shareholders in November 1906, ordered Lake Superior to transfer its assets to named trustees. The assets were conveyed to the trustees by a trust instrument dated December 7, 1906, the trust now in issue.

The terms of the trust give the trustees a full power of sale over the property, as well as the power to reinvest in other property. It requires the trustees from time to time and at least once a year to distribute such portion of the net income from the property as they might deem proper to the persons registered as shareholders of Great Northern on December 6, 1906. The total interest of these beneficiaries was divided into 1,500,000 equal shares, each beneficiary receiving the number of shares and a certificate therefor equal to the number of shares of Great Northern stock he owned on December 6, 1906.[3]

The trust is to continue during the lives of 18 specified persons plus an additional 20 years after the death of the last survivor, unless sooner terminated. The trust instrument directs that upon the expiration of the 20

3. These certificates of interest in the trust are now traded on the New York Stock Exchange.

years following the death of the last survivor the trustees are to wind up the affairs of the trust, to pay all trust obligations, and then (a) to distribute all remaining moneys to the certificate holders and (b) to convey back to Lake Superior, or its successors or assigns, all remaining property other than money. In 1913 Lake Superior transferred to Great Northern whatever interest Lake Superior had in the trust. Through merger in 1970, Burlington Northern, Inc., has acquired whatever interest Great Northern as successor of Lake Superior had in the trust. The district court found that the purpose of the trust had been accomplished; that the trust should be terminated; and that Burlington Northern had no real interest in the trust. The court instructed the trustees that all property, both money and otherwise, should eventually be transferred to the certificate holders. In making the stated findings, the court first concluded that the trust instrument was ambiguous. It accordingly admitted and considered extrinsic evidence consisting of hundreds of pages of documents. We hold that the trust instrument is not ambiguous and that the district court's findings were clearly erroneous.

The scope of our review, as stated in Rule 52.01, Rules of Civil Procedure, is limited to the extent that findings of fact made by a district court should not be set aside unless clearly erroneous, due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. This rule establishes a broader scope of review than that applied to the findings of a jury or an administrative tribunal, for as we said in *In re Estate of Balafas*, 293 Minn. 94, 96, 198 N.W.2d 260, 261 (1972), the trial court's findings may be held clearly erroneous, notwithstanding evidence to support such findings, if the reviewing court is left with the definite and firm conviction that a mistake has been made.

The capacity of a reviewing court to independently judge the meaning and effect of documentary evidence has never been clearly articulated by this court. Where, as in this case, the critical evidence is documentary, there is no necessity to defer to the trial court's assessment of the meaning and credibility of that evidence. We have in some cases deferred to the trial court's findings upon such evidence. *The Telex Corp. v. Data Products Corp.*, 271 Minn. 288, 292, 135 N.W.2d 681, 685 (1965); *Independent School Dist. No. 877 v. Loberg Plumbing & Heating Co*, 266 Minn. 426, 435, 123 N.W.2d 793, 799 (1963); *Sommers v. City of St. Paul*, 183 Minn. 545, 551, 237 N.W. 427, 430 (1931). In our later cases, however, we have not done so. *Midway Center Associates v. Midway Center, Inc.*, Minn., 237 N.W.2d 76 (1975). See, also, *Northwestern Nat. Bank v. Simons*, Minn., 242 N.W.2d 78; filed herewith; *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 205 N.W.2d 121 (1973); *Town & Country Shopping Center v. Swenson Furniture Co.*, 261 Minn. 100, 104, 110 N.W.2d 525, 528 (1961). We think that the better rule is that articulated by Judge Jerome Frank in *Orvis v. Higgins*, 180 F.2d 537, 539 (2 Cir. 1950):

> "* * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no sig-

nificance. (c) But where the evidence supporting his findings as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances."

Except as the scope of our review may be deemed broader under the rule of *In re Estate of Balafas, supra,* we adopt and approve this articulation.

The first matter the district court ruled on was the duration of the trust. One paragraph of the trust is a uses and trusts clause which provides that the trust shall continue for the lives of 18 named persons plus an additional 20 years, unless sooner determined.[4] A later paragraph provides that upon the expiration of the 20 years following the death of the last survivor of the 18 named persons the trustees shall proceed to wind up the affairs of the trust.[5] The district court found, based on these two paragraphs, that the intended duration of the trust is ambiguous and that it is impossible to determine from the face of the trust instrument when the trust should

4. The trust instrument is in the form of a conveyance of real property. Following the habendum clause, the uses and trusts clause provides as follows: "IN TRUST, HOWEVER, to hold, use and dispose of the said property and all income and proceeds thereof, upon the trust herein expressed, for and during the lives of the following named persons and the life of the last survivor of them, and for and during the twenty (20) years next following the death of such last survivor, unless said trust shall be sooner determined, the names and description of said persons upon whose lives the duration of said trust is limited, being * * *."

5. Paragraph 17 of the trust instrument reads: "Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to wind up the affairs of said trust. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall convey and transfer unto the party of the first part, or its successors or assigns, all property, save said moneys, held by them under said trust.

"And thereupon said trust shall cease."

terminate. It found, by resort to extrinsic evidence, that the intent of the settlor was that the trust be terminated before the stated term of 18 lives plus 20 years.

The trust instrument, however, is not ambiguous. The clearly stated intent of the grantor was that the trust continue for the lives of 18 persons plus 20 years, unless for some reason it might be "sooner determined." A provision with respect to "sooner" termination is not uncommon. While it recognizes the possibility of an earlier termination, it does not evince an intent that termination should come before the stated period. Situations which could cause termination sooner include, for example, failure of subject matter, termination by mutual consent of all concerned, and termination by legislative action amending the statutes which regulate trusts. While it is true any one of these situations conceivably could occur before the end of the stated term of 18 lives plus 20 years, and while it is true we cannot therefore ascertain with certainty the time when the trust will in fact be determined, the intent of the settlor is clear. Extrinsic evidence, therefore, may not be permitted to vary the plain meaning expressed in the trust instrument.

Even were the extrinsic evidence upon which the court relied to be considered, it does not, taken as a whole, establish that the settlor's intent was that the trust should be terminated sooner than the expressly stated term of 18 lives plus 20 years. The district court in effect reformed the written trust instrument because of its finding that the settlor intended the trust to terminate upon the mining out of the "natural" ores. Express provisions of a trust instrument may be reformed if it clearly appears that the settlor was mistaken as to the provisions contained in the instrument it executed. The evidence does not demonstrate such a mistake, however. It indicates at most

that the settlor may have been mistaken as to how long the trust properties would continue to be of significant value. Although the natural ores have been exhausted, the properties contain enormously valuable resources of taconite. The record does not show that the settlor, had it fully appreciated the true value of these mineral lands, would have drawn the trust to terminate sooner than the stated term of 18 lives plus 20 years.

The second matter which the district court determined was that Burlington Northern has no interest in the trust. The trust instrument provides that the trustees shall have full power to sell the trust property, exchange it for other property, or otherwise dispose of all or part of it.[6] Another paragraph provides that at the termination of the trust all properties other than money shall be turned over to Lake Superior (the party of the first part), or its successors or assigns (now Burlington Northern).[7] The district court found an inherent ambiguity in these two provisions and again resorted to extrinsic evidence to determine the intent of the settlor. We find no ambiguity in these provisions.

Even if the extrinsic evidence were considered, however, we are not persuaded that the intent of the settlor was other than what was expressed in and incorporated

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6. Paragraph 9 of the trust instrument reads: "The trustees shall have full power, during the continuance of this trust, to sell at public or private sale, or exchange for other property, or otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property that may have become subject to this trust; and to invest the proceeds of any such sale or sales in other property; and in case of such re-investment the property so acquired, as well as all property acquired by the trustees in exchange, or otherwise, for property held by them under this trust, shall be held by the trustees under the same trust and with the same powers and duties in respect thereto as are hereby provided in respect to the property herein described and conveyed."

7. See footnote 5, *supra*.

by the trust.[8] The trustees may be given a power of sale over the property, but they are also instructed to turn over to the settlor or its successor whatever property they do not so choose to liquidate. There is no inconsistency in such a power and instruction.

The district court reasoned that no reversion in Lake Superior was intended because such reversion would have caused Great Northern to violate the law and its charter when it engaged in carrying ore mined from the trust properties. The court specifically had in mind the Hepburn Act, the Interstate Commerce Act, and "the tenor of the United States Supreme Court cases covering such matters."

The Commodities Clause of the Hepburn Act, now 49 U.S.C.A., § 1(8), upon which the court particularly focused, prohibits a railroad from carrying ore mined or produced by it or under its authority or in which it may have any interest, direct or indirect. It is not clear that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for it is not clear that it would have been deemed to have any interest in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust.

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8. Burlington Northern contends that the settlor intended that the trustees be restricted in their powers not only by the provisions on the face of the trust instrument, but also by certain rules of the common law, which rules were incorporated into the trust by implication. We express no opinion on what rules of common law might have been intended to be incorporated into the trust, for these contentions may be addressed to the trial court upon remand.

The district court found that if there was to be a reversion of the properties to Lake Superior, it was intended to be no more than a receptacle for worthless properties. From this the court concluded that no reversion was intended at all. Even had the settlor assumed in 1906 that all it should ever expect to receive back was title to virtually worthless, mined-out properties, it did direct that the properties be returned, without regard to what their value might in fact be at the termination of the trust. If these properties have become unexpectedly more valuable today because of improved mining technology, this fact does not change the settlor's expressed intent that the properties be returned when the trust is terminated.

Finally, the district court concluded that any property the trustees returned to Lake Superior or its successor at the termination of the trust would, because of the contract of October 20, 1899, and certain informal communications made by James J. Hill, be held in perpetual trust for the benefit of the shareholders of Great Northern as they appeared on December 6, 1906, or their successors in interest. The court found that the successors in interest of these shareholders are the certificate holders and that they for all intents and purposes hold a fee interest in the trust properties. We disagree.

It is clear that the contract of October 20, 1899, referred to earlier in this opinion, established Lake Superior as the instrumentality of Great Northern. Lake Superior agreed, in consideration of the transfer of property to it, that it would hold and dispose of said property in whatever manner Great Northern might direct. At that time Lake Superior held the property for the benefit of Great Northern, not for the benefit of Great Northern shareholders per se. Great Northern thereafter directed

Lake Superior to dispose of the property by conveying it into a trust, the beneficial interest in which was to be given to the shareholders of Great Northern as they appeared of record on December 6, 1906. We agree that following receipt of this direction Lake Superior could have been said to hold the property for the benefit of the shareholders, in that it was obligated to convey to a trust for the benefit of the shareholders. Indeed, the recitation of the trust instrument executed on December 7, 1906, states that Lake Superior holds the property "for the benefit of the shareholders of The Great Northern Railway Company."[9]

It does not follow, however, that any property the trustees are to return to Lake Superior or its successor in the future will be held for the benefit of the shareholders per se or their successors. Under the contract of 1899 such property would, contrary to the district court's conclusion, be held for the benefit of Great Northern or its successor. In 1913 Great Northern succeeded to Lake Superior's interest in the trust, and Burlington Northern has since succeeded to Great Northern's. Any property returned to Burlington Northern by the trustees would therefore be held only for Burlington Northern's own benefit. The district court's decision, accordingly, must be reversed.

Because it concluded that Burlington Northern had no interest in the trust, the district court did not consider the issues which the trustees sought to resolve by these

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9. This recitation could alternatively have arisen from an imprecise usage of language. Under the terms of the contract of 1899, Lake Superior held the property for the benefit of Great Northern, but Great Northern's interest was in turn held for the benefit of its shareholders. Thus it may be said that, in a manner of speaking, Lake Superior held the property for the benefit of the shareholders even before Great Northern directed that the trust be executed.

proceedings—namely, the extent of the trustees' authority to convert trust assets into cash and, if they have such authority, what their duties are with respect to the exercise of that authority. We better fulfill our function as a reviewing court when we review issues after they have been decided below, rather than deciding them ourselves in the first instance. Therefore, we reverse and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

OTIS, *J.*, took no part in the consideration or decision of this case.

ORDER ON REHEARING

(July 19, 1976)

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT
ST. PAUL, MINN.

In re Trust Known as Great Northern
Iron Ore Properties.

Supreme Court Nos. 44775 and 44776

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

JOHN MCCARTHY
Clerk Supreme Court

OPINION OF THE TRIAL COURT

File No. 386008

DISTRICT COURT
SECOND JUDICIAL DISTRICT

STATE OF MINNESOTA
COUNTY OF RAMSEY

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

ORDER AND MEMORANDUM

The above matter came on before the undersigned on December 11, 1972, April 20, 1973, June 18, 1973, and July 6, 1973, pursuant to a Petition by the Trustees for confirmation of their appointment as trustees, approval of their filed accounts, and for instructions. The matter of confirmation and approval of the accounts having been previously determined, those matters are no longer before the Court. The Trustees appeared by their counsel, Frank Claybourne and Jack C. Foote; Burlington Northern appeared by its counsel, Richard V. Wicka, Kurt W. Kroschel, Frank S. Farrell, Reginald Ames, and James W. Becker; Petitioners Charles S. Arms and Elizabeth P. Arms appeared by their counsel, Thomas V. Koykka, Keith Benson, David Coleman, James R. Oppenheimer, and John H. Wolf; and Margot Siegel, one of the Certificate Holders in the Trust, appeared by Harold Siegel, her attorney. At the various hearings testimony was taken and documentary evidence introduced, and all counsel have supplied the Court with extensive briefs, and the Court now being duly advised in the premises makes the following order:

IT IS ORDERED that the Trust under the agreement of December 7, 1906, between Lake Superior Company, Limited, and Louis W. Hill, James N. Hill, Walter J. Hill, and Edward T. Nichols, commonly known as the Great Northern Iron Ore Properties Trust, shall be terminated in accordance with the attached Memorandum.

IT IS FURTHER ORDERED that this Court's Order of December 20, 1972, requiring the publication of any future notices or orders is hereby suspended, and this Order shall be disseminated by mailing a copy of it to each of the certificate holders at his or her last known address as soon as practicable following receipt thereof by counsel for the Trustees.

The Memorandum attached hereto is made a part of this Order.

Dated: November 6th, 1973.

HYAM SEGELL
Judge of District Court

MEMORANDUM AND INSTRUCTIONS

This matter came before the Court pursuant to a Petition of the four Trustees of the Great Northern Iron Ore Properties Trust [hereinafter sometimes referred to as the Trust in Issue] for confirmation of their appointment and for instructions. The confirmation of the Trustees having been resolved in a separate proceeding, that matter is no longer before the Court. Charles S. Arms and Elizabeth P. Arms who are certificate holders of the Trust in Issue are parties to this proceeding, and they are hereafter generally referred to as Arms or Arms Petitioners. Burlington Northern, Inc., is a party to this proceeding as a successor to the Great Northern Railway Company and is hereafter generally referred to as Burlington Northern. Great Northern Railway Company is hereafter referred to as the Great Northern. In order to ascertain whether the requested instructions should be given on the basis of the precise language of the Trust Instrument or on the basis of its language plus other extrinsic evidence, including parol evidence, the Court was first required to make a determination whether the Trust Instrument was ambiguous. In this connection, our Supreme Court has said:

> "Although under the parol evidence rule [in the absence of fraud or other ground for reformation or revision], extrinsic evidence may not be used to contradict or vary the settlor's written declaration of intent, it is nevertheless admissible in interpreting and clarifying a writing which is ambiguous and uncertain as to the settlor's intended meaning. *Thus, for the purpose of resolving ambiguity, extrinsic facts and surrounding circumstances—inclusive of the conduct of the parties and any practical construction which they themselves have applied to the writing—may be considered in ascertaining the settlor's manifest intent.*" [Emphasis supplied] *In Re Declaration of Trust by Bush,* 249 Minn. 36, 42, 81 N.W.2d 615.

Moreover *In Re Moulton's Estate,* 233 Minn. 286, 46 N.W.2d 667, the Court said:

> "Not only the trust instrument itself, but the situation of the settlor and his manifest purpose in creating a trust, may be considered."

It is thus evident from these decisions that, if the Trust Instrument is ambiguous, the Court is entitled to consider extrinsic evidence in order to clarify the writing.

In their Petition for Instructions, at Paragraph 5, the Trustees stated as follows:

". . . Petitioners believe that they have the authority, to the extent practical, to convert all assets in their hands to cash as termination of the Trust becomes imminent, and to distribute the proceeds of such conversion, together with any other cash on hand at the termination of the Trust to the then holders of Certificates of Beneficial Interest."

Some months after their original Petition was filed, the Trustees moved to amend and did amend their Petition so as to change the quoted portion above to read as follows:

". . . Petitioners ask whether or not they have the authority to convert all assets in their hands to cash as termination of the Trust becomes imminent, to the extent practicable. If the Court finds they have, then they wish to be instructed as to whether they have the duty so to convert."

Implicit in the foregoing language quoted from the Trustees' Petition and its amendment is the fact that the Trustees, as well as their lawyers, who are extremely competent, felt that the original Trust Instrument had certain ambiguities in it, or, at the very least, that its meaning might be in doubt. [*Mason's Dunnell Minnesota Digest*, Volume 19B, Section 9893 (5)] It is difficult to understand why the Trustees now deny that the Trust Instrument is in any way ambiguous [see Memorandum of Trustees on Order to be Made, p. 3], since they plainly acknowledge this ambiguity in their original and amended Petition.

As the Arms Petitioners point out, the Trust Agreement is "less than crystal clear." Not only is the document, itself, patently ambiguous in this Court's view, but its ambiguities have been enhanced by a very substantial

change in circumstances occurring since the inception of the Trust. The most dramatic ambiguity lies in the problem presented in reading Paragraph 17 in conjunction with the language contained in Paragraphs 2, 3, and 4, as is pointed out in the Arms Petitioners Brief at page 46. This is the problem that is presented by authorizing, on the one hand, in Paragraphs 2, 3, and 4, the disposition by sale or otherwise of all assets, both income and corpus, contained in the Trust during the lifetime of the Trust and, in Paragraph 17, suggesting that there be a remainder upon termination of the Trust.

Having thus made the threshold decision that the Trust was patently ambiguous, and having in mind the case law which admits of extrinsic evidence in such cases, the Court admitted literally hundreds of exhibits offered by all parties; from these documents a pertinent history emerges, which has been fairly useful in resolving the ambiguities inherent in the Trust Instrument.

I. BACKGROUND COMMENTARY

A. ACQUISITION OF ORE PROPERTIES.

The history of the Trust is inextricably intertwined with the history of the Mesabi Range. The first large scale iron ore strike occurred on the Mesabi Range in 1889-1890 [Arms Exhibit 89, p. 366], and the iron ore properties that went into the Trust in Issue were acquired between 1897 and 1906. Some of these properties were acquired as a consequence of the Great Northern Railway Company and its subsidiaries, such as the Eastern Railway Company of Minnesota [Hereafter Great Northern Railway Company will be referred to as Great Northern] acquiring additional railroad property. As an example, the acquisition of the Duluth and Winnipeg Railway, which would have connected the Eastern Railway's lines at Du-

luth with those at Crookston [Arms Exhibit 1, p. 3152; Arms Exhibit 61, p. 215], required that certain other companies, such as the North Star Construction Company which served the railway and the North Star's land holding company, the North Star Iron Company of West Virginia, be acquired at the same time. While the presence of iron ore was suspected, the North Star Iron Company considered that its land holdings were essentially timberland, consisting of approximately 12 to 18,000 acres [Arms Exhibit 1, pp. 3152-3153]. Similarly, James J. Hill, the President of Great Northern, in conjunction with his acquisition of the Duluth, Mississippi River and Northern Railway Company, was compelled to purchase approximately 25,000 acres on the Mesabi Range known as the Wright-Davis lands; this acquisition was completed on January 27, 1899, with Hill acquiring the Wright-Davis lands in his own name for approximately $4,000,000.00. Since these acquisitions bear on subsequent issues of purpose and intent, the details of them are of sufficient importance to relate in full at this juncture. James J. Hill testified in Congressional hearings under oath as follows:

"The Chairman. What properties had you acquired, Mr. Hill, on the Mesabi Range?

Mr. Hill. The first was some property that came with a bankrupt railway that was started to be built from Lake Superior west.

The Chairman. What railway?

Mr. Hill. I think it was called the Duluth & Winnipeg and it became bankrupt." [Arms Exhibit 1, p. 3152]

He explained further:

"The Chairman. What relation was there between this railroad and this body of ore lands? How did

they happen to throw in the ore lands with a railroad that did not touch the ore lands?

Mr. Hill. The parties who were instrumental in promoting the railway were interested or had in connection with it a lot of lands on the Mesabi Range called the North Star Iron Co. In the purchase of that Duluth & Winnipeg Railway the North Star Co.'s lands came with it—that is, something like 90 per cent of the stock of the company. This North Star Co. was an incorporated company.

The Chairman. And had lands on the Mesabi Range?

Mr. Hill. Yes, sir.

The Chairman. What was the extent of their holdings?

Mr. Hill. I could not say: about ten or twelve thousand acres.

The Chairman. At what time was this?

Mr. Hill. I think we got that property about 1896 or 1897." [Arms Exhibit 1, p. 3153]

Turning then to the Wright-Davis purchase, James J. Hill testified:

"Mr. Hill. I think I can make it a little plainer, by stating the way that we came to own that ore, just how we got it.

There was a railway belonging to Wright & Davis, Michigan lumbermen, which connected with the Duluth & Winnipeg. They owned somewhere in the neighborhood of 25,000 acres of land that was particularly well situated on the range.

One mine—possibly more than one, but one mine—opened on their land, and was a large shipper.

That ore came down over the lumbermen's road to a connection with the road that we bought and finished through to the Red River Valley.

My son was in charge of the Eastern Minnesota, which was a subsidiary line owned by the Great Northern. He was very anxious that I should come up and look the ground over. He attached a great deal of importance to the transportation of the ore. He had met Mr. Wright and had an understanding with him that if they sold they would give us an opportunity to purchase it.

The Chairman. Who do you mean by 'us,' Mr. Hill?

Mr. Hill. Well, myself. I had never been up on the range. I went up and I saw this Mahoning mine. It is the largest mine probably on the range.

I told him to take it up with Messrs. Wright & Davis at any time he was ready and to see what he could do.

Shortly after, he got a communication from them that they were about to dispose of it to the Consolidated Co.

Mr. Young. The Consolidated Mines Co.?

Mr. Hill. Yes, sir; and afterwards known as the Rockefeller Co. Of course, if they bought it they would transport it over their own railway. There was very little business on that road for the first 160 miles outside of the ore.

Within a short time, by appointment, I met Wright and Davis in Chicago. Mr. Wright was quite an old man, and he was anxious to close out his entire interests in the Mesabi, the railroad and the ore lands.

He also had some uncut pine. This was originally pine land. They bought it for that purpose.

Some of it they had disposed of and agreed to cut and deliver the logs to the Mississippi River at Swans River. He wanted me to purchase the whole outfit, including his contract. His contract was with Mr. Warehouser, or the Warehouser Co. Mr. Warehouser expressed his willingness that if I assumed the contract he would consent to the transfer.

In that way I bought the Wright & Davis property, about 25,000 acres." [Arms Exhibit 1, pp. 3155-3156]

B. SOURCE OF CONSIDERATION PAID FOR ORE PROPERTIES.

As to payment for the lands in question, James J. Hill further testified in the Congressional hearings that he had personally acquired these iron ore properties.

"The Chairman. What properties had you acquired, Mr. Hill, on the Mesabi Range?

Mr. Hill. The first was some property that came with a bankrupt railway that was started to be built from Lake Superior west [i.e., property owned by North Star Iron Company.]" [Arms Exhibit 1, p. 3152; see also Arms Exhibit 61, Pyle, p. 215]

He also testified under oath before the Knutson Committee of the Minnesota Legislature on February 14, 1907. [Arms Exhibit 7]

"Q. Now, you purchased those lands from the Wright & Davis Company, did you?

A. Yes sir.

Q. You purchased them personally?

A. Yes sir.

Q. Out of your own funds?

A. I raised the money to do so.

Q. Pledged your own credit?

A. Yes sir.

Q. Was the credit of the Great Northern Railway Company at all pledged to the payment of them?

A. The Great Northern Railway Company had nothing to do with it.

Q. Any of the securities of the Great Northern Railway besides your own personal ones?

A. Not a dollar.

Q. The Great Northern Railway Company had absolutely nothing to do with the securing of those lands?

A. No sir.

Q. Now, it was a matter entirely personal with you?

A. In so far as the Great Northern Railway Company is concerned, they had no more to do with it than you had." [Arms Exhibit 7, pp. 15-16]

* * * * *

"Q. Was the credit of the Great Northern Railway Company pledged to its payment?

A. Not in any way or manner.

Q. Was the credit of the Eastern Railway Company of Minnesota pledged to its payment?

A. Not in any manner.

Q. Any one besides yourself?

A. No sir.

Q. As endorser?

A. No sir.

Q. As guarantor?

A. No sir.

Q. That was an entirely personal deal?

A. Personal matter." [Arms Exhibit 7, p. 22]

* * * * *

"The Chairman. What did you pay Wright & Davis for this property?

Mr. Hill. $4,050,000.

The Chairman. It became your property?

Mr. Hill. Yes sir.

The Chairman. You gave them a check for that property, I presume you did not pay them in cash?

Mr. Hill. I paid them, I think, $1,000,000.

The Chairman. Did you not give them a check for that property on the Chase National Bank?

Mr. Hill. I gave them, I think, $1,000,000, and then I paid them a further amount; and a portion of it was left until they were in a position to deliver it to us.

The Chairman. But was not that property paid for by check to Wright & Davis, drawn on the Chase National Bank, of New York?

Mr. Hill. I think $1,000,000 was paid in check on the Chase National Bank, and possibly the later payments, because I did my banking business with them." [Arms Exhibit 1, p. 3160]

* * * * *

"The Chairman. Was not that money taken—was not the payment of that check—taken out of the funds or out of the surplus of the Great Northern Railroad?

Mr. Hill. Not a penny of it.

The Chairman. Did you make a statement of that kind before the Miller Committee?

Mr. Hill. Of what kind?

The Chairman. A statement to the effect that a part of this money in some way came out of the Great Northern Railroad.

Mr. Hill. It did not; not a penny of it.

Mr. Young. What is the Miller Committee?

The Chairman. The Minnesota committee which investigated into this situation.

Mr. Hill. Before that committee I testified clearly that the Great Northern never paid a dollar.

The Chairman. The Great Northern or none of the Great Northern Funds, then?

Mr. Hill. None of the Great Northern funds were paid to Wright & Davis; not a cent.

The Chairman. It was all your own personal property?

Mr. Hill. Yes, sir." [Arms Exhibit 1, p. 3161]

Following the acquisition of the approximately 12,000 acres owned by North Star Iron Company and the approximately 25,000 acres owned by the Wright-Davis people, additional iron ore land was acquired largely by Louis W. Hill, the son of James J. Hill, to make up a total of approximately 65,000 acres of ore lands over which the Hills had complete or fractional control.

C. LAKE SUPERIOR COMPANY AS A PREDECESSOR TRUST.

On July 25, 1899, James J. Hill, James N. Hill, his son, and Robert I. Farrington, who was the Comptroller of the Great Northern and one of its vice-presidents and directors, formed the Lake Superior Company, Limited, a limited partnership under the laws of Michigan, ostensibly for the purpose of dealing and working in mineral lands in the State of Minnesota, among others, mining iron ore and marketing it, and leasing lands and mines for royalties. The Lake Superior Company was thereafter used as a holding company or as a trust vehicle to hold these various ore properties comprising some 65,000 acres, that had been acquired by the Hills, for the benefit of the stockholders of the

Great Northern. James J. Hill made this abundantly clear in his testimony before the Congressional committee:

"Mr. Gardner. I understand the witness owned certain stocks in the Wright & Davis Co. and other pieces of property which he transferred to the Lake Superior Co. (Ltd.) under deed of trust for the benefit of stockholders of record of the Great Northern Railroad securities; is that right?

Mr. Hill. For the benefit of the stockholders of the Great Northern Railway Co.

Mr. Gardner. The Great Northern Railroad Co.?

Mr. Hill. Yes.

Mr. Gardner. What was the consideration for that? I mean, you and your associates owned this property and apparently you turned it over to a holding company?

Mr. Hill. There was no associates. I bought it and paid for it, and the property was handled and I was paid back, I think, the cost price and interest at 5 per cent during the time my money was invested in it.

Mr. Gardner. That is to say, the Lake Superior Co. paid you for these pieces of property?

Mr. Hill. Yes.

Mr. Gardner. And, in return, the stockholders of the Great Northern Co. paid the Lake Superior Co., did they?

Mr. Hill. The Lake Superior Co. had considerable income. They started right in to have considerable income from the mines.

Mr. Gardner. What I could not understand in the course of the question was the means by which these properties ceased to be operated and owned in your interest and became operated and owned in the interest of the stockholders of the Great Northern Railway Co.

Mr. Hill. They were never operated—

Mr. Gardner. Leave out the word 'operated,' then, and say 'owned' in your interest.

Mr. Hill. They were owned.

Mr. Gardner. You owned them?

Mr. Hill. Yes.

Mr. Gardner. You put them in a holding company, to wit, the Lake Superior Co. (Ltd.)?

Mr. Hill. Yes.

Mr. Gardner. Ordinarily people would say that the holding company would hold them for your benefit, instead of which they hold them for the benefit of the stockholders of the Great Northern Railway Co.

Mr. Hill. That is right.

Mr. Gardner. I ask what was the consideration, and why was that done?

Mr. Hill. What was the consideration?

Mr. Gardner. Yes.

Mr. Hill. The consideration was the amount that I had paid with 5 per cent interest during the time that my money was invested.

Mr. Gardner. Was that paid back to you?

Mr. Hill. Yes." [Arms Exhibit 1, pp. 3167-3168]

* * * * *

"Mr. Beall. It seemed to me that the right thing was for them to have refunded to you the amount of money you had paid—

Mr. Hill. So long as I got my money, with interest, what difference did it make?

Mr. Beall. Of course you had no basis for complaint, but I can not see what interest these—

Mr. Hill (interposing). But I represented these stockholders. I was, in a measure, dealing with myself.

Mr. Gardner. Let me put it this way: You pay $4,000,000, really acting for the stockholders of the Great Northern Railway Co.?

Mr. Hill. I bought that property so as to get control of the transportation of that ore, which was important to that portion of the road, which had practically no business.

Mr. Gardner. You did it with their interest in view—not with your own interest in view?

Mr. Hill. That is right.

Mr. Gardner. Subsequent events showed the property was worth a good deal more than $4,000,000?

Mr. Hill. Yes.

Mr. Gardner. You are paid back your $4,000,000, and, really, the whole thing has been done for the stockholders?

Mr. Hill. Yes.

Mr. Gardner. They get the balance, whatever it is worth, over that $4,000,000?

Mr. Hill. Yes.

Mr. Gardner. But supposing the thing had gone the other way; supposing, instead of being worth $4,000,000, it had proved to be worth only $2,000,000, how would you have been protected?

Mr. Hill. I should have been out. I was under no obligation to buy it from them." [Arms Exhibit 1, p. 3171]

The foregoing testimony relates primarily to the acquisition of the Wright-Davis lands. Omitting these and the North Star Iron Company lands, almost all of the additional lands that were subsequently to make up the properties put into the Great Northern Iron Ore Properties Trust were gradually acquired by Louis W. Hill after the execution of a contract between Great Northern and Lake Superior Company dated October 20th, 1899. [Arms

Exhibit 5] In many of the cases Hill would file a declaration of trust in connection with properties which he had acquired, and the properties would later be transferred for value to Lake Superior Company, Limited. [See p. 3, Arms Exhibit 5]

A good summary of these transactions is found in the Congressional hearings in the sworn testimony of James J. Hill.

"Mr. Gardner. The witness had shown that stocks in various concerns which he owned and extraneous pieces of property were transferred to the Lake Superior Co. (Ltd.).

Mr. Hill. In trust.

Mr. Gardner. In trust; and that the beneficiaries of the trust, instead of being himself, were the stockholders of the Great Northern Railway Co."

* * *

"Mr. Gardner. . . . That puts the trustees, after they pay you back in the position of being a holding company for new parties?

Mr. Hill. Yes.

Mr. Gardner. *And the new parties are the Great Northern Railway Co.*?

Mr. Hill. *No, sir; the stockholders of the Great Northern Railway Co.*

Mr. Gardner. Did the stockholders pro rata pay into the Lake Superior Co. (Ltd.) the amount which they paid you?

Mr. Hill. No.

Mr. Gardner. How did they acquire their interest?

Mr. Hill. How did they? It was given to them.

Mr. Gardner. Where did the Lake Superior Co. get its funds to pay you?

Mr. Hill. The Lake Superior Co. carried on the business and received the income from royalties and one source and another. I think they sold the elevator. I am speaking from recollection now. I do not carry these transactions. I think, however, they sold the elevator and they may have used that fund.

Mr. Gardner. Let me see if I have the transaction right: You purchased certain shares in the Wright & Davis Co. and certain other parcels of property, and you transferred them to the Lake Superior Co. (Ltd.) under a deed of trust for the benefit of the stockholders of the Great Northern Railway Co.

In time they realize on some of these properties, derive an income on others, and from the funds received from those profits and those sales of property, like the elevator company, they pay you back, and the stockholders of the Great Northern Railway Co. at once become the proprietors of so much of the property as is left after paying you back. Is that correct?

Mr. Hill. They are the beneficiaries, not the proprietors.

Mr. Gardner. That is, they become the sole beneficiaries of this property held in trust for them?

Mr. Hill. That is as I understand it.

Mr. Gardner. In other words, it cost the stockholders of the Great Northern Railway Co. nothing?

Mr. Hill. Nothing.

Mr. Gardner. You were paid back for what you expended and, ultimately, the Great Northern Railway Co. stockholders get the benefit of that which the property actually proved to be worth over and above what you paid for it?

Mr. Hill. Yes, sir.

Mr. Gardner. Is that a correct statement?

Mr. Hill. That is the transaction. That is it exactly." [United States Steel Corporation Hearings, Arms Exhibit 1] [Emphasis supplied]

Thus, whether the properties were transferred by deed of trust, as was indicated in some of the foregoing testimony of James J. Hill, or whether they were transferred in consideration of the repayment to Hill of the monies that he had, in fact, personally paid for these properties, it is quite plain that by transferring the ore properties to Lake Superior Company, Limited, Hill clearly intended to create a trust in favor of the stockholders of the Great Northern rather than a trust in favor of the railway corporation, itself; while there is a suggestion in the contract dated October 20th, 1899, executed by the Great Northern and Lake Superior Company, limited, that the ore properties were transferred to Lake Superior Company at that time, it is quite likely, based upon the sworn testimony of Hill, that the ore properties were transferred to Lake Superior Company before and after that date; however, regardless of when they were transferred, it is quite clear that, at the very least, an implied if not an express trust was created by Hill in favor of the stockholders of the railway, of which he was president, by the transfers. That the Lake Superior Company was such an implied or express trust for the benefit of the Great Northern shareholders is further borne out in James J. Hill's testimony before the Knutson Committee:

> "I think that it was an arrangement made for the purpose of carrying these lands in trust for the benefit of the shareholders." [Arms Exhibit 7]

And in a letter which he wrote to Mr. Gardner M. Lane on August 26, 1905, before the creation of the Trust in Issue, he said:

> "The iron ore properties are held in trust for the benefit of the Great Northern shareholders . . ." [Arms Exhibit 24d]

It is interesting to note that Burlington Northern in its brief concedes the trust nature of the holdings of Lake Superior Company prior to the creation of the Trust in Issue. In its brief, at page 90, the writer states:

> ". . . the interest of the stockholders of Great Northern Railway Company and the properties trusteed with the Lake Superior Company, Limited, was identical to the interest of Great Northern Railway Company stockholders in the properties trusteed with the Great Northern Iron Ore Properties Trust . . ." And at page 91 of its brief, the writer also says:

> "It is also evident that the Lake Superior Company, Limited, was considered a trust for the benefit of the stockholders of the railroad."

In a letter that James J. Hill wrote to J. F. Baker on January 19, 1906, before the inception of the Trust in Issue, Hill referred to the property that was "trusteed." [Arms Exhibit 24e]

It is thus clear that all parties to this proceeding, as well as all of the parties who were initially involved in the acquisition and disposition of these ore lands, had in mind that the lands would be held at all times for the benefit of the shareholders of the Great Northern.

D. THE CONTRACT OF OCTOBER 20, 1899.

On October 20, 1899, a contract was entered into between the Great Northern and the Lake Superior Company. [Arms Exhibit 12] As a preamble to that agreement, it is stated at Paragraph 1 that certain stocks, bonds,

and properties have been transferred to the Lake Superior Company. Included among these are the lands embraced by the acquisition by James J. Hill of the Wright-Davis properties and the lands embraced by his acquisition of the North Star Iron Company. None of these lands, as was demonstrated previously, were owned by the Great Northern, nor did that company advance any of the consideration for their purchase so far as is known from the sworn testimony of James J. Hill. This fact does not necessarily mean that there was a failure of consideration in the contract of October 20th, 1899, but it does add to the somewhat obscure history that surrounds the acquisition and disposition of the ore properties. The contract further provides against the alienation of any of these properties without the express consent of the Great Northern Railway; however, the important provision is that contained in Paragraph 3, in which the stockholders of the Great Northern are made the third-party beneficiaries of all of the income that is left from the Lake Superior Company's operations after the payment of all administrative expenses, et cetera. Thus, if there was any question about the express or implied trust in favor of the stockholders of the Great Northern Railway, it is certainly dispelled by the contract of October 20, 1899. [Arms Exhibit 12]

Carrying out the spirit and letter of the aforementioned Paragraph 3 in the contract, it is to be noted that during the period that the contract was in force, and prior to the execution of the Trust Agreement in issue, Lake Superior Company received in income from the Wright-Davis lands to June 30th, 1906, approximately one and three-quarter million dollars; of this amount it distributed to the stockholders of the Great Northern the sum of $493,413.50 [Arms Exhibit 16a]. This exhibit also shows the acquisition of additional ore lands costing ap-

proximately one and a quarter million dollars, thus explaining the disposition of all of the income received.

What was understood by both the Great Northern directors and its stockholders regarding these various ore and other properties is of even greater significance. In separate resolutions ratifying the contract of October 20, 1899, by the stockholders of the Great Northern, and by its Board of Directors, the following language appears:

> "Whereas the stocks, bonds and properties transferred to the Superior Company by such contract were acquired with funds which might otherwise have been lawfully distributed in the form of dividends to and among the stockholders of the company, *and such stocks, bonds and properties have been held subject to the division among such stockholders through a sale and distribution of proceeds, or otherwise . . .*" [Burlington Northern Exhibits 1 and 2] [Emphasis Supplied]

Such language clearly manifested an intent on the part of both the stockholders and directors, both of whom approved the resolution, to recognize the stockholders' *proprietary* interest in the iron ore and predecessor properties, as well as their beneficial interest in the income therefrom.

At this point it should be emphasized that from all of the evidence introduced by the parties, which has been carefully examined by the Court, there is no credible support for the idea that the Great Northern Railway Company ever owned or controlled any of the ore properties. While the contract of October 20, 1899 [Arms Exhibit 12], recited a purported transfer of the Wright-Davis lands and North Star Iron Company lands from Great Northern to Lake Superior Company [Arms Exhibit 12], all evidence conclusively points to the fact that these lands were owned

individually by James J. Hill and his family, and that no part of the consideration used to acquire them was ever paid by the Great Northern. [Arms Exhibit 61, Exhibit 7, pp. 15-16, p. 22, Exhibit 1, pp. 3160-3161] The other properties that appear to have been transferred by the railways in that contract may well have been owned by the railway but were not in any sense iron ore properties. As a matter of fact, these other properties were sold by Lake Superior Company before the Trust in Issue was created, and the proceeds from such sales were either used to purchase some of the minor ore properties, or to repay James J. Hill. The bulk of the ore properties, however, were purchased individually by James J. Hill and his son, Louis, and thereafter transferred to Lake Superior Company. The source and acquisition cost of all the ore properties is well illustrated in Arms Exhibit 5.

One other fact is worthy of emphasis. Neither in the sworn testimony of James J. Hill nor in any document was it ever suggested that the Great Northern should become a residuary beneficiary of the iron ore properties. All of the evidence points clearly to a termination of the trust at such time as the natural ore mining was completed. At no time during the past sixty-five years has the Great Northern Railway Company reflected on its books or in its records any dollar value or any other interest in the ore properties. [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Considering that it had no interest to start with and never claimed any interest during the past sixty-five years, it is interesting to observe that it now claims that it is entitled to millions of tons of beneficiated or taconite ores.

A few words should be devoted to what the Hills and subsequently Lake Superior Company acquired in

terms of iron ore in these various purchases. The Wright-Davis lands, consisting of approximately 25,000 acres, contained the famous Mahoning Mine at Hibbing, which continued to operate as a natural ore mine until it closed in August, 1973. James J. Hill, in the period 1903 to 1908, repeatedly expressed his belief that there were about 500,000,000 tons of natural ore in the ore properties. [Arms Exhibit 1, pp. 32, 36, Arms Exhibit 7, pp. 83, 85, Arms Exhibits 43b, 24d, 24f, 24g, 24h, 24j, Burlington Northern Exhibits 17, 23, and 24] As the Arms Petitioners have pointed out in their brief, the Hill estimate of approximately 500,000,000 tons of ore turned out to have been "fantastically accurate." The Trustees' reports state that through the year 1972 a total of 457,605,775 tons of ore had been mined from the iron ore properties held by the Trust. [Arms Brief, p. 32] It was estimated that there were approximately 15,923,681 tons of natural ore remaining and that the "last major mining" would probably be concluded in about a year. [Arms Exhibit 64, p. 4]

As Burlington Northern points out in its brief, the estimates that Hill made covered only *natural ore* [Burlington Northern Brief, p. 110], and that specifically with an iron content of approximately 49 per cent or more. It is apparent that no one at that time thought in terms of any other kind of ore that might be located on the property, and, while there was an awareness that there were vast quantities of taconite existing on the ore properties, there was no thought by anyone at that time that such ore could become merchantable in the future. Taconite was considered to be country rock [see the Hill testimony in Arms Exhibit 1], and, of course, it was not a merchantable ore because the minimum merchantable ore at that time contained at least 49 per cent iron; in the early years of mining operations in that area the natural

ores were averaging 60 per cent iron content; while we know from Dr. E. W. Davis that some efforts were made in the second decade of the twentieth century to prepare taconite for the smelter through a sintering process, these efforts were largely a failure. [Arms Exhibit 90] It was not until the process of pelletizing the ore was developed in the 1940s that any of the mining companies gave any thought to the feasibility of mining taconite. The Trustees of Great Northern Iron Ore Properties, themselves, saw no prospects in taconite until their reports in the late 1950s [see Arms Exhibit 65, Report for 1957], and, as a matter of fact, no taconite was removed from trust properties until 1967. It is abundantly clear, therefore, that the Trust in Issue contemplated the mining of natural ore only, and its duration was geared to that end.

E. THE TRUST IN ISSUE

On December 7th, 1906, the Trust Agreement in Issue was executed by the Lake Superior Company, Limited, as the settlor and Louis W. Hill, James N. Hill, Walter J. Hill, and Edward T. Nichols as Trustees. The first prefatory clause in that agreement is worth noting:

> "Whereas the party of the first part has acquired the shares of stock hereinafter described and transferred, and *now holds the same for the benefit of the shareholders of the Great Northern Railway Company*; . . ." [Emphasis Supplied] [Arms Exhibit 70-A]

There were two reasons for creating this trust; these will be discussed in some detail at a later point. The first was to assure the Great Northern that it would obtain the freight revenues from transporting the ore and, secondly, to assure that the stockholders of the Great

Northern would receive the income from the ore lands so long as the then merchantable ore lasted; it should be noted in this connection that it was anticipated that the ore would last approximately fifty years [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22]; and it was for this reason that the ostensible duration of the trust—and its duration is undoubtedly ambiguous—was to be measured by the lives of eighteen named persons, plus twenty years following the death of the last survivor of them. Some of these persons were as young as *three* years old at the time of the execution of the Trust. It was the intent to give sufficient duration, approximately 100 years, to the trust, it being fully anticipated that it would be terminated before that time. [Arms Exhibit 3] As a matter of fact, in the same paragraph, wherein it is stated that the Trust shall last for a period of twenty years next following the death of the last survivor, it is also stated immediately following that language "unless said trust shall be sooner determined." This language, without a doubt, is ambiguous because it provides for a fixed *and* an indeterminate date for termination in the same instrument, without at the same time providing the means of determining which date should be used. In other words, unless extrinsic evidence is examined to determine what the intention of the settlor was at the time of the execution of the Trust Instrument, it is impossible to determine when it should terminate. The Court has examined such evidence and has concluded 1] that it was the intention of the settlor that the Trust would be "determined" long prior to the expiration of twenty years following the last survivor; 2] that all of the natural ores and surface rights would be disposed of prior to that time since it was anticipated that the mining of 500,000,000 tons of natural ore would take approximately fifty years [Arms Exhibit 3 and Burlington Northern Exhibits 19

and 22]; and 3] that at the end of that period of time, even though there was taconite on these lands, it still would not be merchantable ore, that the lands would thus have no further value, and that the Trust should be terminated. This is well borne out, if not conclusively established, in a document prepared by Robert I. Farrington, former comptroller-vice-president of Great Northern, designated as Arms Exhibit 3. In that document he states as follows:

> "Where a trust is entered into by individuals, the law prescribe[d] [sic] that it must be made for the benefit of certain people, and that it can run for but a certain number of years after the death of some person or persons who were alive at the time the trust agreement was entered into. *We figured that it will take probably fifty years to mine out the ore in the ore lands; consequently the trust must run for at least fifty years.* As it can only run for twenty years after the death of the survivor of the parties named in the trust agreement, it was necessary, of course, to name a lot of young children and to name several of them. For instance: Suppose Mr. James J. Hill had been named as a single party instead of all the children who were named, and that he should die in five years. Then the trust could last for only 25 years, while, as above stated, *it is expected it will take fifty years to mine out the ore.* Suppose that they had simply named Louis Hill's three children, all three of them might die within five or ten years, in which case the trust would terminate before all the ore was mined out. By naming as many people as were named, the probabilities are that several of them at least will live for thirty or forty years, so that the trust which will extend for twenty

> years after the death of the last one of them would run for fifty or sixty years.
>
> "You and Jack were named with a number of other children, so that *there would be enough young people to assure one or two of them at least living sufficiently long to permit the entire ore to be mined out during the life of the trust agreement.*" [Emphasis Supplied] [Arms Exhibit 3]

The Trustees have the full power to sell or otherwise dispose of any or all of the property and, after paying the usual expenses, must distribute annually to the certificate holders not only the income from said properties but *the proceeds of any sales of property made at any time.* [See paragraph 4, Arms Exhibit 70-A] The Trust further provides, in Paragraph 17, that after the expiration of the twenty years next following the death of the last survivor of the measuring lives, the Trustees are to immediately wind up the affairs of the Trust and, after paying all expenses, are to distribute all monies to certificate holders and convey and transfer to Lake Superior Company, Limited, or its successors, all property except said monies. As previously pointed out, there is an inherent ambiguity in having a defined term in a trust document and having in the same document a provision for an undefined term, or, in other words, providing for the termination of the trust at an unspecified earlier date. Such language and the resultant ambiguity are clearly contained in this instrument. Moreover, there is an inherent ambiguity in the language which provides for the disposition of all property, both income and corpus, during the lifetime of the trust to the designated beneficiaries, and at the same time appears to provide for the retention of the property until the fixed term of the trust has expired and thereafter provides for a distribution of that property to a different designated person or entity.

F. THE PURPOSES OF THE TRUST

The two principal purposes of this Trust have been recited previously. The primary one, and of greater significance, was the fact that James J. Hill was interested in securing the freight revenues from the transportation of iron ore and, secondarily, he desired to give the entire beneficial interest in the trust-held property to the certificate holders. These purposes are well illustrated in the testimony of James J. Hill and statements made by him; for example:

> ". . . We wanted to secure a share of that iron tonnage for our railroad, and their road running into and their control of the Mahoney [Mahoning] mine, which at that time was being opened up, and a considerable shipper, we bought their property. The railway portion of it was turned over to the railway, and the mineral lands were put in trust for the benefit of the shareholders of the Great Northern Railway." [Arms Exhibit 7, pp. 10-11]

* * * * *

"Q. And your purchase of these lands was to secure freight for transportation on behalf of the Great Northern Railway Company?

A. Yes sir." [Arms Exhibit 7, p. 30]

* * * * *

"I bought that property so as to get control of the transportation of that ore, which was important to that portion of the road, which had practically no business." [Arms Exhibit 1, p. 3171]

* * * * *

"My purpose was to secure the shipment of ore from these properties for the Great Northern; *and the profits from the mines, if there were any profits,*

for the stockholders of the Company." [Arms Exhibit 8, p. 11]

That the stockholders of Great Northern were to benefit ratably by this Trust is clearly set forth in the Resolution of the Great Northern Board of Directors:

> "Resolved, Further, That the said trust be and is hereby created *for the benefit pro rata of those persons* who shall be shareholders of this Company registered and appearing as such upon its books at the close of business on the 6th day of December, A.D. 1906, and of their assigns under and by virtue of assignments made in accordance with the provisions of said trust agreement * * *." [Arms Exhibit 18, p. 3]

While it is argued that the Trust Instrument in Paragraph 17 appears to create a reversionary interest of some sort, it is clear from the documents and the intent as gleaned from those documents that no such interest was contemplated. For example, Hill clearly understood and so testified that the stockholders of the Great Northern Railway were to become *the sole beneficiaries of the property held in trust.* [Arms Exhibit 1, p. 3170] At various times both before and after the creation of the Trust, Hill repeatedly made clear that "the iron ore properties are held in trust for the benefit of the Great Northern shareholders" [Arms Exhibits 24d and 24e], that "the value of the ore certificates" is "in the ore itself" [Arms Exhibit 24i], and that "the stockholders were put in possession of *all* the benefits accruing from the whole transaction." [Arms Exhibit 8, p. 11] [Emphasis Supplied] Moreover, the certificates, themselves, indicated that the Trust was established "for the ratable benefit of the shareholders of the Great Northern Railway Company." [Arms Exhibit 8] The fact that everyone understood that all of the iron ore was to be mined out within forty to fifty

years [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22] is also very persuasive in determining whether the so-called reversionary interest created by Paragraph 17 was to be anything more than a reversion of cut-over, mined-out land, if that.

Incidentally, it probably should be noted at this point that whatever reversionary interest was created in Paragraph 17 of the Trust Instrument, which according to the instrument was to revert to Lake Superior Company, Limited, was assigned to the Great Northern Railway Company pursuant to an agreement dated February 3, 1913. [Arms Exhibit 48] The assignment of the so-called reversionary interest was couched in the following terms, to-wit:

> "The Lake Superior Company does assign, transfer and set over to the Great Northern Railway the following described property, to-wit:
>
> "*Reversionary Interest*
>
> "All interest, reversionary or otherwise, which the Lake Superior Company, Limited, has under and by virtue of the provisions of that certain agreement, and especially of the seventeenth paragraph thereof, dated the 7th day of December, 1906, by and between said Lake Superior Company, Limited, and Louis W. Hill, James N. Hill, Walter J. Hill and Edward T. Nichols, or to any property of any nature whatsoever now held by said Louis W. Hill, James N. Hill, Walter J. Hill and Edward T. Nichols, as trustees under said agreement." [Arms Exhibit 48]

In Paragraph 3 of that agreement the Great Northern assumed "all obligations and liabilities of the [Lake] Superior Company and agrees fully to perform the same." This language absolutely guarantees the present certificate

holders an interest in perpetuity in the ore properties. Great Northern's so-called reversion must be read in light of Paragraph 3 and thus is, at best, an obligation to maintain the predecessor trust, Lake Superior Company, for the benefit of the present certificate holders. No one in this litigation disputes the fact that the Lake Superior Company was a trust or a holding company for the benefit of the stockholders of the Great Northern Railway Company. [Burlington Northern Brief, pp. 90 to 91] Since Burlington Northern would succeed to whatever obligations Lake Superior had through the assignment [Arms Exhibit 48], it would have to carry out the provisions of the contract of October 20th, 1899, and those of the express or implied trust created by James J. Hill for the benefit of the shareholders of Great Northern when he formed Lake Superior Company and transferred the ore properties to it. If Lake Superior Company was a trust as Burlington Northern concedes [Burlington Northern Brief, pp. 90 and 91], the assignee of Lake Superior would have to carry out that trust. The so-called reversion is nothing more than a perpetuation of the present trust but without a termination date. This, in essence, is a merger of the legal and beneficial interests in the present certificate holders, giving rise to the right of immediate title and possession.

G. REASONS FOR ESTABLISHING THE TRUST.

While the purposes of the Trust are perfectly clear, the reasons for establishing the Trust and the pre-existing trust in Lake Superior Company, Limited, are equally clear. In the first place, the Great Northern had no charter power to own any interest in the ore land. This was well understood by its president, James J. Hill, and he told the Knutson Committee:

"The Great Northern Railway Company, as I have repeatedly said, could not have any ownership in or carry on mines in Minnesota; it has no charter for anything of the kind." [Arms Exhibit 7, p. 33]

And again before the Knutson Committee he said in response to a question:

"Q. I am not disposed to be technical about the matter. Under its charter can the Great Northern Railway Company deal in mining lands or in stocks of other corporations?

A. No, sir." [Arms Exhibit 7, p. 74]

And at a later point:

"Q. And your reason for organizing it was because under your charter you supposed the Great Northern Railway Company had no right to do this kind of business?

A. Well, we knew it hadn't." [Arms Exhibit 7, p. 76]

To the Congressional Committee Hill said:

". . . I do not think that, as a corporation, the Great Northern Railway Co. could operate mines. It might operate a coal mine for its own use, but I do not understand that it could go into the operation of mining iron ore." [Arms Exhibit 1, p. 3172]

Moreover, Robert I. Farrington, the comptroller and subsequent vice-president of Great Northern, stated as follows:

"The so-called ore lands were purchased by Mr. Hill individually; the Great Northern did not have the charter right to own, lease or operate them; . . ." [Arms Exhibit 10, pp. 84-85]

Secondly, under the law of Minnesota, a railroad, with one exception, could not own land, the exception being

"other than as may be necessary for the proper operation of its railroad." *Minnesota General Laws,* Chapter 204, Section 3, effective July 1, 1887. While this statute has since been repealed, it was in force at the time of the creation of the Trust in Issue and its antecedent trust, the Lake Superior Company, Limited. Thirdly, the Interstate Commerce Act was a vehicle standing in the way of the Great Northern Railway's transportation of commodities owned by it. Even before the enactment of the Commodities Clause of the Hepburn Act, the Interstate Commerce Commission had held in *Grain Rates of Chicago, Great Western Railway Company,* 1897, 7 Interstate Commerce Reports 33, that it was a violation of the Interstate Commerce Act for a railroad to transport commodities owned by it; that doctrine was upheld before the United States Supreme Court in *New York, New Haven and Hartford Railway Company vs. Interstate Commerce Commission,* 1906, 220 U.S. 361.

On June 29, 1906, an amendment was passed to the Interstate Commerce Act which, in this litigation, has become familiarly known as the Commodities Clause of the Hepburn Act; that legislation made it unlawful for a railroad to transport, except for use in its own business, any commodity:

> *"mined or produced by it,* or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect . . ." [Emphasis Supplied.] Ch. 3591, Stat. 584, Section 1.

James J. Hill was cognizant of this statute and cognizant of the fact that the railroad could not own ore property directly or indirectly if it wished to garner the iron ore freight revenues. He testified as follows before the Congressional Steel Hearings:

"The Chairman. You do not claim that the Great Northern Railway Co., under the present interstate-commerce act, could own and operate the Mahoning mine as a merchant mine?

Mr. Hill. I have just said it could not." [Arms Exhibit 1, p. 3172]

Finally, the personal philosophy of James J. Hill required him to sever any ownership interest in the ore lands from both the Great Northern and himself. He repeatedly made this clear in the steel hearings and in testimony before the Knutson Committee:

"Senator Clapp. As touching upon the subject of the private car, what is your opinion of the ownership of the carrier united in the same person in the production and distribution of the product? Ought that to be prohibited?

Mr. Hill. Senator, you are coming on tender ground, but I will answer that question.

Senator Clapp. I thought I might be.

Mr. Hill. We are here to speak out in meeting. I think *that every railway officer in this country should be disqualified from having any interest, directly or indirectly, in any large producer of traffic,* whether it is a coal mine or a factory or a mill or anything else, on a line of railway where he is on the pay roll.

Senator Clapp. And the reason for that suggestion is what?

Mr. Hill. That he can not be fair to the other fellow and punish himself.

Senator Clapp. And the opportunity is such that it can not be detected and prevented?

Mr. Hill. It is so easy, if there is a great demand for coal in one direction, or for some commodity in one

place, for him to help one fellow and forget the other. We have made it a rule (and *it never can be done for a moment on our road,* and I have always been very glad that the rule is in effect) that if a man wants to work for himself in any particular at any point on the line of the road, he must first sever his connection with the company; and it saves us a lot of trouble. And I think that in some cases it might help to reduce rates on natural products like coal very, very materially if there was a fair field, or a square deal, or whatever you like to call it." [Arms Exhibit 33, pp. 1521-1522] [Emphasis Supplied]

* * * * *

"We have always had a rule that nobody connected with the road can carry on any business where he is dealing with the railroad. Now, I could not hold those lands and carry them for myself without violating that rule. I expected that they would be turned over for the benefit of the shareholders. I was under no obligation to turn them over, I could have kept them for myself. I turned them over and trusteed them for the benefit of the shareholders." [Arms Exhibit 7, p. 30]

* * * * *

"I didn't want to carry on the ore business personally, for the reason that I had made it a rule that nobody working for the company, myself or anyone else, could have any business that called for their transacting business with the company, anything along the railway where the company was interested in the carriage." [Arms Exhibit 7, pp. 131-132]

One other bit of historical background is essential to a decision in this case. The use of a trust as a vehicle to mine ore lands which would become exhausted in approximately

fifty years came about as a result of some adverse court decisions which prevented Hill and his associates from employing a holding company to operate the mines. The early history of the Great Northern is one of various attempts at monopolistic practices and violations of the Antitrust Laws. [See *Northern Securities Company vs. U. S.*, 193 U.S. 197; *Pearsall vs. Great Northern Railway Company,* 161 U.S. 646] In the *Northern Securities* case, James J. Hill and his associates, along with the associates of J. P. Morgan, caused to be organized the Northern Securities Company on November 13, 1901. The purpose of this company was to serve as a holding company for the stock of both the Northern Pacific Railway Company and the Great Northern Railway Company. It would also have been used as a vehicle to hold the various ore properties as is evident from the argument made in the *Northern Securities* case by George B. Young who, incidentally, was the draftsman of the Trust in Issue. In his argument before the Supreme Court, he stated as follows:

> ". . . and like the company originally projected, the enlarged company [referring to Northern Securities Company] was to be authorized and was expected to acquire shares in coal mines and *in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold,* and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold." [Page 258 of 193 U.S.] [Emphasis Supplied]

Since the Lake Superior Company had a duration of only twenty years and was organized in 1899, some vehicle had to be found to continue the interests of the shareholders of Great Northern in the ore properties. As was

pointed out by Mr. Young in his argument, the Northern Securities Company was the natural vehicle for this purpose, but it was struck down by the United States Supreme Court in its October, 1903, term as being a violation of the Antitrust Laws; thus, but for that decision, the Trust in Issue would have been a corporation, and the certificate holders would have had a pro rata legal interest in the ore properties by way of shares of stock. What is important, however, is that the argument made by the draftsman of the Trust in Issue clearly demonstrates that there was an intent that the shareholders of Great Northern Railway Company have *all* of the benefits of the ore properties regardless of how long those ore properties might continue to be mined.

H. THE CHANGE OF CIRCUMSTANCES.

Finally, the substantial change of circumstances that has been wrought since the institution of the Trust in Issue should be chronicled. In the late 1950s, magnetic taconite finally became economically feasible to mine. At the present time the Trustees have 381,657,132 tons of commercially mineable taconite committed to present plants. In addition, the Trustees have leased lands containing 159,320,838 tons of magnetic taconite which are not under lease. Of the tonnage that is committed to present plants, it is estimated that it will take approximately sixty years to mine it. Of the tonnage that is not committed to present plants, there is no way of foreseeing when this tonnage might be mined, and this is similarly true of the tonnage which is not under lease. [Arms Exhibit 64]

In addition to the foregoing tonnages, there is possibly an equivalent tonnage of magnetic taconite that is not commercially mineable today. The reason for this is that it is not economically feasible to mine such taconite when it lies

under such a thick overburden of both raw earth and non-magnetic taconite layers. [Arms Exhibit 64]

Besides the magnetic taconite, there is a vast tonnage of taconite "sometimes in layers above or below the magnetic taconite," which is referred to as non-magnetic taconite; however, while there are known metallurgical methods to recover it, there are no commercial plants to treat it. It is estimated that the trust properties might contain as much non-magnetic as magnetic taconite. [Arms Exhibit 64]

Because of these vast tonnages, it is conceivable that mining of taconite from the ore properties could run over a period of a hundred years from the present time. By contrast the mining of natural ores will be completed by the end of this year. [Arms Exhibit 64]

II. COURT AUTHORITY AND JURISDICTION FOR INSTRUCTIONS

M.S.A. 501.33 provides that upon the petition of any person appointed as a trustee, the District Court shall consider the application to confirm his appointment and specify the manner in which he shall qualify. Thereafter, the District Court shall have jurisdiction of the trust as a proceeding *in rem*.

M.S.A. 501.35 provides that after a trustee has been confirmed, he may at any time thereafter petition the Court for instructions in the administration of the trust or for a construction of the trust instrument.

While the original Petition of the Trustees was for confirmation and instructions, all matters relating to confirmation have been concluded by the Court, and the necessary orders have been issued. The Court thus has jurisdiction over the Trust and, having confirmed the appointment of the Trustees, now has jurisdiction to provide in-

structions in accordance with the Petition and Amended Petition of the Trustees.

III. COMMENT AND CONCLUSIONS

A. BURLINGTON NORTHERN ARGUMENTS.

While Burlington Northern has submitted a rather lengthy brief, its approach to the Trust Instrument, and the problems inherent in it, is rather simplistic. It has, for example, endeavored to get the Court to apply the Uniform Principal and Income Act to this trust on the theory that the trust is the typically classic one where income is paid to the beneficiaries and all other principal or corpus of the trust is reserved for the remainderman. This is simply not the intent or design of this trust. The trust assets consist entirely of iron ore lands, and they have, for a period of approximately sixty-five years, been regularly mined, and the underlying land regularly sold or abandoned. As a matter of historical fact, at the time of the creation of the Trust in Issue, the companies whose stock was placed in trust and their subsidiaries owned in fee or controlled by leasehold estate approximately 49,000 acres of land. [The original mining companies have since been dissolved, and the Trustees now own the lands directly.] In addition, they owned an undivided one-half interest in approximately 16,000 acres. This meant that they had an interest of one kind or another in a total of approximately 65,000 acres, and, if the 16,000 acres are viewed at half value because of the one-half interest, there was a net acreage of approximately 57,000 acres. By December 31st, 1943, this acreage had been reduced to approximately 22,700 acres, and it should be noted that sale or tax forfeiture accounted for a reduction of approximately 35,310 acres. Of the approximately 20,000 acres that were sold, the proceeds of these sales were received by the corporation selling the land and were then

distributed by the corporation to the Trustees as dividends. When those dividends were received by the Trustees, they, in turn, distributed them to the certificate holders, or beneficiaries, of the trust. [Burlington Northern Exhibit 57] The trust clearly gives the Trustees the power to distribute both income and *principal* to the beneficiaries, and furthermore gives them the power to terminate the trust at a time prior to the date of termination provided in Paragraph 17. The Uniform Principal and Income Act simply cannot apply to a situation where the trust is essentially operating as a business entity, viz. a corporation, and there is full power to dispose of the corpus. The arguments of Burlington Northern in its brief, therefore, at pages 32 and 33 relative to the application of the Uniform Principal and Income Act are viewed simply as being inapposite insofar as they pertain to this trust.

Similarly, the argument which is made at pages 52 and 53 of the Burlington Northern brief relative to the distinction between money and property is also a rather strained interpretation of the trust instrument and its practical construction over a sixty-five-year period. Burlington Northern argues that "monies" do not include proceeds of sales of stock [or other property], and "that in making distribution to the Certificate Holders there is no authority to entrench upon 'property' [corpus]." This simply does not accord with the facts, and it is hardly worth the trouble for Burlington Northern, after observing the Trustees for sixty-five years distribute not only income from the sale of iron ore *but the proceeds* from the sales of property, to assert that the Trustees are limited to the distribution of income. As a matter of fact, the sale of iron ore is a sale of corpus in the wasting asset context which we have here. The Trust Instrument clearly authorizes the Trustees to distribute both income and corpus at any time they choose

and not less than annually; the Trustees, themselves, have construed the instrument in this fashion and have followed this line of thinking for the past sixty-five years, with the full knowledge and acquiescence of Burlington Northern and its predecessor, the Great Northern Railway. Examples of language which the Trustees have used to support their position to distribute the proceeds from the sale of approximately 20,000 acres of trust property to the certificate holders are as follows:

> "IN TRUST, HOWEVER, to hold, use and dispose of the said property and all income and proceeds thereof, . . ."
>
> * * *
>
> "3. Said trustees shall, out of the moneys so received by them, or *out of the proceeds of any sales made by them or any of said shares,* pay all expenses of said trust, . . ."
>
> * * *
>
> "4. After payment made of or provision made for the expenses of said trust, the said trustees shall, . . . at least once in every year, distribute and pay such portion of the net income *or proceeds of the property held by them* as such trustees, . . . to the persons [et cetera] . . ."
>
> * * *
>
> "9. The trustees shall have full power, during the continuance of this trust, to sell . . . or *otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property* that may have become subject to this trust; . . ." [Arms Exhibit 70a] [Emphasis Supplied]

The ultimate strain on language appears in the Burlington Northern brief at page 54, where it is argued that

the proceeds of any sales as they are designated in Paragraph 3 of the Trust relate clearly to corpus "but the proceeds of property held by them designated in Paragraph 4 of the trust instrument refers only to income."

One other endeavor by Burlington Northern that was troubling, was the effort made in its brief to create the illusion that the Great Northern was actually in control of the ore properties originally, and that it was under its direction and control that all these various documents were executed and the Trust in Issue created. [Burlington Northern Brief, pp. 84, 90, 106, 110, 113, and 119] An example of this effort is contained on page 84 of the brief, where it is said:

> "Shortly after the first ore properties came under the control of Great Northern Railway Company through the purchase of the Duluth, Mississippi and Northern Railroad and the Duluth, Superior and Western Railroad with their land holdings, which included the North Star Iron Company and the West Mesabi Land Company, the heart of the properties which were eventually transferred to Great Northern Iron Ore Properties Trust, it was recognized that the operation of the ore properties created certain legal and corporate problems. . . ."

This statement is utterly contrary to historical fact. If it were true, then the trust was and is no more than a scheme by Hill and his associates to violate the laws of the United States and Minnesota and the Charter of the Great Northern Railway. It is abundantly clear that the Great Northern did not come into control of, or set apart, or transfer to the Lake Superior Company, the ore properties. This was done by the Hills, the properties were paid for by the Hills, and any additional ore properties that

were acquired by Lake Superior Company were acquired with income generated from the original ore properties that had been transferred by the Hills to Lake Superior. [Arms Exhibit 16a] While the Trust in Issue was designed to insure to the degree possible that the Great Northern would be in command of the freight revenues generated from the transportation of iron ore, it had one other basic purpose, and that was to insure that the stockholders of Great Northern and not the corporation would have the full benefits of the iron ore property. The latter purpose was fundamental to the legality of Great Northern's monopoly of the freight revenue. This Court is fully satisfied that James J. Hill would have gone to any lengths to insure these purposes, including violation of the laws of the United States, if necessary. Cf. *Northern Securities Company vs. U. S., supra.* However, the only practical construction of this trust based upon the extrinsic evidence introduced is that it was a vehicle designed not to violate the law. While it is an ambiguous document, it did not and could not create for the Great Northern a vested reversionary interest, because, if it had, it would have violated the law. One thing is certain, the Great Northern was completely and utterly divorced from any interest, legal or otherwise, in the ore properties, and its claim today to windfall benefits is utterly devoid of merit. While Burlington Northern in its brief strongly urges that the Trust Instrument is unambiguous, its repeated attempts to strain the meaning of the language in it, fully supports the Court's view of its inherent ambiguities.

Burlington Northern cites the opinions in two cases: *In the Matter of the Estate of Margaret Rea Agnew Bunker, Deceased,* 77 Misc. Rpt. 320, 137 N.Y. Supp. 104 [1912], and *Bowdoin, et al vs. Fairchild, et al,* 103 At. 715 [R.I., 1918], as supporting its position on the construction of

the trust. [Burlington Northern Brief, pp. 149-152] In both cases the Court was faced only with the question of whether the Great Northern Iron Ore Properties Certificates of Beneficial Interest should be treated as capital or as income in an estate; and the court in both cases concluded that the certificates should be treated as principal; however, in both cases that construction is based upon the premise that *there was no distribution of property or of the proceeds of the sales of property among the certificate holders but only of income collected and distributed by the trustees.* This is utterly erroneous and is directly contrary to the facts in this matter; there is no question but what millions of tons of iron ore have been sold, which is property in the truest sense, and thousands of acres of property, omitting the iron ore, have been disposed of, the proceeds of both of which have been distributed to the certificate holders; from this it can hardly be said there has not been a substantial distribution of property or a distribution of the proceeds of sales of property, contrary to the conclusion in the *Bunker* and *Bowdoin* cases. While urging the strange rationale of these cases upon the Court, at another point in its brief Burlington Northern acknowledges that real estate was sold and in some cases the surface rights were forfeited. [Burlington Northern Brief, pp. 54 and 55] What it omits pointing out, however, is that after the properties were sold, the proceeds of those sales were distributed to the certificate holders. [Answer and Amended Answer by the Trustees to Burlington Northern Interrogatory No. 14]

B. SOME ADDITIONAL VIEWS OF THE SO-CALLED REVERSION

This Memorandum has been addressed primarily to the idea that the Trust Instrument is ambiguous, and that its ambiguities are compounded by the substantial change

of circumstances. We know, for example today, that it is likely that ore will be mined from these lands for perhaps another hundred years, long after the fixed termination date in the trust. But if the Trust Instrument is examined against the background of extrinsic facts and surrounding circumstances, the settlor's manifest intent becomes clear, and certain conclusions are inevitable.

1. THE REVERSION WOULD VIOLATE THE LAW AND RAILWAY CHARTER.

As previously pointed out in this Memorandum, the primary reason for creating this trust was to secure the traffic revenues generated by the iron ore traffic. In the early leases there were traffic clauses which tied in the ore traffic revenues to the Great Northern Railway Company. [Arms Exhibit 64, Burlington Northern Exhibit 15] Of course, since the trust for many years was dominated by trustees who were contemporaneously officers and directors of the Great Northern, there was no question but what that railway company would carry the iron ore traffic whether there were traffic clauses or not. If, as is now suggested by Burlington Northern, its predecessor, the Great Northern, originally had and subsequently maintained control over the ore properties, temporarily parted with possession of them, but continued to have a legal, vested reversionary interest in them, then such clauses injected into the leases executed by the Trustees of Great Northern Iron Ore Properties Trust, tying the traffic to the Great Northern Railway, were plainly illegal, because they were violations of 1] the Commodities Clause of the Hepburn Act, 2] the Interstate Commerce Act, and 3] the tenor of the United States Supreme Court cases covering such matters; moreover, they would also have violated the Charter of the Great Northern. It is clear that the

railroad had to be completely divorced from the ore properties at all times and remain divorced therefrom in order not to violate the laws of the United States and its Charter. After all, as Burlington Northern notes in its reply brief at page 40: "The Commodities Clause [of the Hepburn Act] enacted in 1906 remains unchanged to this day."

If, as is now contended by Burlington Northern, the assignment transferring Lake Superior's interest in these ore properties to Great Northern [now Burlington Northern] turned over to Great Northern a legal, vested reversionary interest in them, and if that reversionary interest at the time it ripened consisted of ore properties containing unmined iron ore, Great Northern, now Burlington Northern, would then be in violation of the Commodities Clause of the Hepburn Act and its own Charter. It is clear from an examination of the Trust in Issue, the underlying documents, and particularly the testimony of James J. Hill that there was no intention of ever having Great Northern come into possession, legal or otherwise, of the ore properties as long as those properties contained ore which required railway shipment.

2. THE REVERSION AS A RECEPTACLE FOR WORTHLESS PROPERTIES.

As Burlington Northern points out in its brief at page 110, and concedes, everyone thought in terms of natural ores and agreed that those ores would be exhausted in a matter of forty to fifty years. Upon the exhaustion of the natural ores, the trust would terminate. [Arms Exhibit 3, Burlington Northern Exhibits 19 and 22] Thus, there would never be any need to wind up the trust in accordance with the provision of Paragraph 17. If there was to be any reversion, it was to be no more than a receptacle for worthless properties. As stated by Burlington Northern in its brief at pages 54 and 55: "The value of the iron ore properties has always been in their mineral content, not in the surface. In fact, the surface was a burden because of taxation, a burden which, if permitted to continue, would have harmed the economic stability of the trust and the ability of the Trustees to provide for the mining of the ore beneath the surface. *The surface was useless because all timber had been cut.* Therefore, portions of the surface of the ore properties were sold, donated, or forfeited for the good of the continued operation of the ore business." [See Burlington Northern Exhibit 57]

If, by chance, the mining of natural ore had lasted until about the time of the fixed termination date of the trust the cut-over, mined-out land would have gone to the reversioner.

3. THE REVERSION AS A PERPETUAL TRUST.

If the language of Paragraph 17 of the Trust Instrument is taken literally, and all of the remaining property is to be transferred to Lake Superior Company, Limited, or its successor, which in this case would be Burlington Northern, then that property according to the assignment of the successor [Arms Exhibit 48] is to be transferred subject to whatever obligations or liabilities Lake Superior Company had toward the stockholders of the Great Northern Railway. [Paragraph 3, Arms Exhibit 48] Those obligations arise by virtue of the terms of the contract of October 20, 1899 [Arms Exhibit 12], or pursuant to the terms of what the Court views as an express or implied trust, based upon the often expressed intention of James J. Hill and Louis W. Hill, his son, when transferring all of the ore property to Lake Superior Company by way of deed of trust or in trust in some fashion for the benefit

of those stockholders. [Arms Exhibits 1, 5, 7, 24d, and 24e] In other words, the so-called reversionary clause, if operable, would merely transfer the property once again to Lake Superior Company and its assigns in trust for the benefit of the stockholders of the Great Northern Railway Company as they existed as of December 6, 1906; today those persons are the present certificate holders, since they are the successors in interest of the original stockholders; it would thus appear that the certificate holders are entitled to have the full fee interest in the ore properties, since by the predecessor and present trusts they are to have the beneficial interest in them until they are exhausted. Anybody who is assigned an unrestricted beneficial interest in a property until that property is exhausted to all intents and purposes has a fee simple interest in it. Certainly a beneficial interest of limited duration must merge with a beneficial interest of unlimited duration so as to entitle the beneficiaries to the fee. Cf. *Simmons vs. Northwestern Trust Co.*, 136 Minn. 357, 162 N.W. 450. Moreover, if trustees have the authority to dispose of all of the income and corpus of the trust during the term of the trust, and pay all proceeds thereof to the beneficiaries, the beneficiaries have a legal as well as beneficial interest in the trust assets.

C. SUMMARY AND CONCLUSIONS

The pattern of mineral exploration in mining has always been the 1] discovery, 2] depletion of those minerals which are cheapest to mine and highest in value, and 3] exhaustion and abandonment. [Arms Exhibit 89, p. 373] Having these principles in mind, which James J. Hill surely must have, it is quite apparent that since taconite was viewed as country rock and there was no interest in the magnetic taconites until 1913 [Arms Exhibit 89, p. 381], and since beneficiation of the low-grade ores did not really start until the second decade of the twentieth century [Arms Exhibit 89, p. 375], the true term of the trust was really to be the approximate fifty years that it would take to mine out the high-grade, natural ores. There was never any intent on the part of the settlor that there be any kind of reversion left that would have any monetary value. As a matter of fact, based on the past history of the Trust in Issue, once the natural ores had been fully mined out, had there been no other ores to mine, the surface rights would have been abandoned to avoid the payment of real estate taxes. It is quite apparent that the idea of a true reversion simply was not within the contemplation of the parties at the time of the execution of the Trust Instrument, or at any time thereafter.

It is most appropriate that the trust be terminated at this time, not only because the mining of the natural ores has been completed but because, as the Court views it, the certificate holders have a sufficient beneficial and legal interest in the trust assets so as to entitle them to a transfer of those assets at this time. This is based upon the idea that anyone who has a third-party beneficiary interest in a contract running into perpetuity, such as the interest the Great Northern Railway stockholders had in the contract of October 20, 1899, or is a beneficiary of an express or implied trust running into perpetuity, is entitled to the legal as well as equitable interest at this time. The testimony of James J. Hill at the various committee hearings relative to the creation of Lake Superior Company and its purposes fully corroborates this position.

Taconite became a commercial product in the mid-1960s, and it has been determined that there are millions

of tons of taconite to be mined out of the ore properties in question, which will take perhaps one hundred years or more. Burlington Northern, of course, looks upon this as a windfall which was contemplated by the trust. The settlor's intent was quite to the contrary. Whatever of value was in the lands was to belong to the certificate holders. The mining of taconite was never dreamed of at the time of the execution of the trust, and even as late as 1951, when there was no taconite income, the Trustees in their report to the certificate holders indicated that commercial production would not be started for many, many years, and that the experimental stages in commercial production which had been conducted for some time would continue for years before the mining of taconite would be commercially feasible. [Arms Exhibit 65, Report of 1951]

The idea of a windfall to Burlington Northern is a concept of very recent origin and one which was undoubtedly conceived as a result of the proceedings herein. Neither Burlington Northern nor its predecessor, Great Northern, had ever contemplated that the reversion would have any commercial or monetary value. They had never referred to it in their records, never shown it in any way in their books of account, and had never placed any value upon it either prior or subsequent to the commercial production of taconite. [See Burlington Northern Response to Request for Admissions, No. 1aa, Tr. 418-419] Moreover, Burlington Northern and its predecessor, Great Northern, recognized that under the laws of the United States as they were at the time of the execution of the trust and at all times since that time, the railway could never become the owner of commercially mineable ore properties, even if it did not intend to transport them over its railway.

As a consequence of the foregoing, the Court has reached certain conclusions in regard to this trust:

1] The trust contemplated that all of the trust purposes would be fulfilled within approximately fifty years of its creation because all of the natural ore would be mined within that time.

2] The trust did not contemplate the economic feasibility of mining magnetic or non-magnetic taconite.

3] The settlor intended that the trust would not extend to or beyond the designated term.

4] A trust which empowers the trustees to dispose of all income and corpus during the lifetime of the trust for the benefit of the designated beneficiaries and permits the termination of the trust after such disposition and before the designated term of the trust is reached creates, in essence, an interest in fee simple in those beneficiaries.

5] A trust which empowers the trustees to transfer a reversionary interest to a third party, who, in turn, must maintain the trust for the benefit of the original beneficiaries in perpetuity, creates, in essence, an interest in fee simple in those beneficiaries.

6] There has been a substantial change of circumstances since the creation of the trust, in that magnetic taconites in vast quantities have become commercially mineable and have been mined since approximately the mid-1960s. These taconites and possibly the non-magnetic taconites will be mined beyond the presently designated term of the trust.

7] The change of circumstances does not change the fact that all of the original trust purposes have been fulfilled because the natural ores have been fully mined, thus making the trust ripe for termination.

A. The beneficiaries have enjoyed all the revenues from the natural ores.

B. The Great Northern and its successor have enjoyed all the revenues derived from transporting the natural ores.

8] The change of circumstances does not require the continuation of the trust until the stated term is reached because the certificate holders are entitled to both the beneficial and legal interest in the trust property at the present time and are entitled to a transfer of those interests to them at the earliest practical time.

IV. INSTRUCTIONS

It is the view of this Court that the trust should be wound up at the earliest opportunity. For the same reasons that the Lake Superior Company and the Trust in Issue were formed, it would not be practical to divide the interests of the individual certificate holders into the various properties of the trust, since there are approximately 10,000 certificate holders. It would be far more prudent to keep the Great Northern Iron Ore Properties together. It certainly would not be practical to convert the assets to cash even though the trustees have the authority to do so. Therefore, upon the winding up of the trust, a corporation should be formed in which the present certificate holders receive approximately the same pro rata share in the corporation as they presently have in the trust. This will, in effect, carry out the intent of the settlor as it will give to the beneficiaries all assets of value upon termination. This would not be a Paragraph 17 termination, but rather would fall under the indeterminate term language of the IN TRUST clause. After all, it must be remembered that the Trust Agreement is ambiguous, and Paragraph 17 is one of the most outstanding examples of that ambiguity, when read with other language in the trust.

The Court is satisfied that the certificate holders should have both the beneficial and legal interest in this property transferred to them at the present time by reason of the language in the Trust Agreement and the language contained in the predecessor Lake Superior Company contract dated October 20, 1899 [Arms Exhibit 12]; but even more compelling than these documents is the clear and unmistakable intent of James J. Hill and his associates in creating Lake Superior Company, Limited, and in creating the Trust in Issue.

The Trustees are instructed to cooperate with the Arms Petitioners in preparing a proposal to be submitted to the Court by May 10, 1974. Such proposal should contain the form of corporate vehicle, including proposed articles of incorporation and by-laws, which will be used as a successor to the trust, itself, and the manner of its possible listing on one of the Stock Exchanges. The proposal should also contain a timetable suggesting the period within which the Trustees should endeavor to wind up the trust, as well as suggestions concerning the winding-up process. Upon receipt of such proposal, the Court will determine whether additional hearings are necessary.

In reaching these conclusions, the Court recognizes the invaluable assistance rendered by counsel for the Arms Petitioners and is agreeable to setting a hearing for a determination of their attorneys' fees at a time convenient to counsel and the Court. That matter was previously reserved for future hearing.

H. S., *Judge*

JUDGMENT IN MINNESOTA SUPREME COURT

(Dated July 19, 1976)

STATE OF MINNESOTA, SUPREME COURT

IN RE TRUST KNOWN AS GREAT NORTHERN IRON ORE PROPERTIES.

44775 and 44776

Pursuant to an order of Court heretofore duly made and entered in this cause [*supra* A1, A12] it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things reversed and the case is remanded to the district court for further proceedings not inconsistent with the opinion, a certified copy of which is attached hereto.

And it is further determined and adjudged that appellant Great Northern Iron Ore Property Trustees herein, do have and recover of respondents Charles A. Arms and Elizabeth P. Arms herein the sum and amount of Five Thousand One Hundred Eight and 74/100 DOLLARS, ($5,108.74); and that appellant Burlington Northern Inc., herein, do have and recover of respondents Charles A. Arms and Elizabeth P. Arms herein the sum and amount of Five Thousand Six Hundred Sixteen and 10/100 DOLLARS, ($5,616.10) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed July 19, 1976.

BY THE COURT

Attest:

John McCarthy, Clerk

Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-524

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and BURLINGTON NORTHERN INC.,
Respondents.

RESPONSE OF BURLINGTON NORTHERN INC. TO ARMS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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IN THE

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IN THE MATTER OF THE TRUST KNOWN AS
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CHARLES S. ARMS and ELIZABETH P. ARMS,
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vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and BURLINGTON NORTHERN INC.,
Respondents.

RESPONSE OF BURLINGTON NORTHERN INC. TO ARMS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

STATEMENT OF THE CASE

Concerning the proceedings below and the trust instrument construed.

The judgment of the Supreme Court of Minnesota here considered was rendered in a special proceeding for the construction of a trust instrument under Minnesota Statutes 501.33 (1971). The instrument construed below was the trust agreement of December 7, 1906 which created and now governs a trust of Minnesota mineral lands known as Great Northern Iron Ore Properties. It is reproduced as *Annex A* of this Response. The proceedings below are summarized in the Court's opinion, printed in Arms Appendix, p. A1 at pp. A2-A4.

The Trust Estate

At December 7, 1906, the properties then to become the trust estate were held by ten proprietary corporations. The stock of these corporations was in turn held by Lake Superior Company, Limited, a Michigan partnership association. All of the assets of this association were held under a contract with Great Northern Railway Company dated October 20, 1899, reproduced as *Annex B* of this Response. Under this contract Lake Superior Company was in effect the trustee of a revocable trust for Great Northern Railway Company.

Creation of the Trust

On December 7, 1906, by direction of Great Northern Railway Company, the trust settlor, Lake Superior Company, Limited, entered into the Trust Agreement. This agreement constitutes the trust instrument. It is also the instrument of assignment by which the trust estate was transferred to the trustees.

Terms of Trust

The trust instrument, by express statement, limits successive equitable estates of term and reversion, consisting of:

—a present term, for certificate holders, measured *pur autre vie* upon the lives of eighteen persons in being at December 7, 1906 plus twenty years in gross, and

—a future interest in the nature of a reversion in the settlor, Lake Superior Company, Limited, its successors and assigns.

The instrument contemplates responsible management and orderly development of the properties during the term. It contemplates that mining proceeds during the term [in the nature of rents and profits of land under Minnesota law] are to be distributed to certificate holders during or in all events at the end of the term. It directs that at the end of the term the trustees are to transfer all remaining properties to the settlor, its successors or assigns. This is an expressly reserved reversion, but under Minnesota law the reversion would exist in any event. The limitation of a trust term without the limitation of a succeeding estate of reversion or remainder gives rise to a resulting trust for the settlor by operation of law. See 4 A. Scott, *The Law of Trusts*, §§430, 430.1, 430.2 (3d ed. 1967). In Minnesota this is prescribed by statute. Rev. Stat. of the Territory of Minn. 1851, c. 74, §18; Minn. Rev. Laws of 1905, c. 60, §3256; Minn. Stat. §501.19 (1971).

Trust Administration since 1906

Since 1906 all of the proprietary corporations have been dissolved and the now remaining mineral properties are directly held by the trustees. The course of operations has been and continues to be such that the trustees have entered into

royalty leases with independent mining corporations which, as lessees, mine, sever and become owners of the ore in consideration of the payment of royalties to the trustees. All property rights of the trustees terminate at the time of severance. The trustees have never engaged in mining operations and have never been shippers of ore.

Transfer of the Reversion

The settlor's reserved reversion in the mineral properties was assigned by Lake Superior Company, Limited to Great Northern Railway Company on February 3, 1913 and is now vested in the Respondent Burlington Northern Inc.

The Scope of the Litigation Below

The Minnesota litigation, so far as here relevant, was solely concerned with a construction of the trust instrument. The litigated issue was the claim of the Arms petitioners, supported by a variety of arguments, that the reversionary interest was unintended and illusory and that the entire interest in the trust properties should be held to have vested in the term tenants [certificate holders]. In effect the Arms petitioners sought to reform the trust instrument under the guise of construction, thereby destroying the reversion and converting the term into a fee simple. Concerning this the Supreme Court of Minnesota said:

> "Express provisions of a trust instrument may be reformed if it clearly appears that the settlor was mistaken as to the provisions contained in the instrument it executed. The evidence does not demonstrate such a mistake * * *."

The Court by its decision and judgment has determined with finality that the trust is operative according to its stated

terms; that it is a term trust for certificate holders, followed by a reversionary interest now vested in Burlington Northern Inc. as successor in interest of Lake Superior Company, Limited and Great Northern Railway Company.

CONCERNING THE ARMS PETITION

The Arms petition states, as basis for jurisdiction under 28 U.S.C. § 1257(3) and as identification of a subject of proposed review that

> "This case turns on the Commodities Clause of the Hepburn Act." (Petition p. 3)

It is necessary to disagree.

The Respondent Burlington Northern Inc. submits that this case presents no substantive question under the Hepburn Act, and in consequence:

(i) there is no jurisdiction for review under 28 U.S.C. § 1257(3); and

(ii) grounds for review are wanting under Rule 19 of this Court.

SCOPE OF THE HEPBURN ACT

The Hepburn Act, an amendment of the Interstate Commerce Act generally known as the Railroad Rate Bill, was enacted on June 29, 1906. It was effective for most purposes on August 28, 1906 (34 Stat. 584), but it was effective on May 1, 1908, in respect of a special section known as the Commodities Clause. This was enacted in the following language:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or com-

modity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for use in the conduct of its business as a common carrier".

The Commodities Clause as originally enacted is now 49 U.S.C. § 1(8) except that the introductory phrase "From and after May first, nineteen hundred and eight" is omitted.

The policy thus expressed looked to an appropriate separation of the ownership of commodities from their pubic carriage. J. J. Hill said as much (but no more) in the 1912 reminiscences quoted in the Arms Petition. Under the Commodities Clause a rail carrier may not be the public carrier of its own ore. No one appears to contend otherwise.

On the other hand, the Commodities Clause does not prohibit the transportation of commodities by a carrier merely because of antecedent acts of mining, manufacturing or production. There is no unlawful carriage if at the time when transportation occurs the ownership of the commodities has passed to an independent owner-shipper. *United States v. Delaware & Hudson Co.*, 213 U.S. 366 (1909). Even where the carrier and the owner-shipper are related by stock ownership the result is the same, assuming only that one is not the *alter ego* of the other. *United States v. Elgin, Joliet & Eastern Railway Co.*, 298 U.S. 492 (1936); *United States v. South Buffalo Railway Co.* 333 U.S. 771 (1948). There is no authority to the contrary and no indicated reason for the adoption of a different rule. The policy of the statute is satisfied.

THE COMMODITIES CLAUSE IS WITHOUT CONTROLLING SIGNIFICANCE IN THE INSTANT CASE

The trust here under consideration was established well in advance of the effective date of the Commodities Clause; it has continued in operation for seventy years and has a prospective duration now measured by two lives in being plus twenty years. If this Court, on review of the Hepburn Act, were to conclude that when the reversion matures at the end of the term the transportation of ore mined from the reversionary lands will be illegal, the reversioner might at that time be required to desist from illegal transportation of the ore. The reversion would remain undisturbed. No different result would ensue if the present existence of a future interest by way of reversion were held to render present transportation illegal (a preposterous supposition). The reversioner's future interest would not be disturbed.

Whereas the Commodities Clause deals exclusively with transportation, the instant case deals exclusively with the Burlington Northern's reversion in Minnesota mineral lands. The Arms petition, purporting to deal with violations of the Hepburn Act, makes no specification of violation on the part of Burlington Northern Inc. or its predecessors in interest. The record supports no claim of violations, past, present or prospective. None is indicated.

The Hepburn Act has nothing to do with any issue justiciable in this Court under Writ of Certiorari. The Act is not a source of Minnesota real estate titles and it imposes no limitations on the ownership of Minnesota lands. Violation of the

Commodities Clause, of whatever magnitude, gives rise to no private remedy, invokes no private penalty and works no forfeiture or escheat. No possible application of the Act could disturb the property rights adjudicated below.

Even if it were otherwise and even though some overriding public interest urgently suggested a review of the Hepburn Act, the instant case presents no factual basis upon which significant review can be predicated. The Commodities Clause is properly enforced in a suit in federal court by the United States brought by the attorney general of the United States to enjoin an illegal transportation of commodities. This is not such a case, nor is this the proper forum.

CONCLUSION

The Respondent Burlington Northern Inc. submits that the circumstances requisite to sustain jurisdiction under 28 U.S.C. § 1257(3) are absent; that the case presents no question of substance under any federal statute and that no reason exists under Rule 19 for issuance of the Writ.

Respectfully submitted,

J. NEIL MORTON
RICHARD E. KYLE
STEVE A. BRAND
FRANK S. FARRELL
Attorneys for Respondent
Burlington Northern Inc.

Briggs and Morgan
Of Counsel

APPENDIX

ANNEX A
TRUST AGREEMENT

AGREEMENT, Made this Seventh day of December, A. D. 1906, by and between the LAKE SUPERIOR COMPANY, LIMITED, an association organized under the laws of the State of Michigan, party of the first part, and LOUIS W. HILL, JAMES N. HILL, WALTER J. HILL and EDWARD T. NICHOLS, parties of the second part, Witnesseth:

WHEREAS, The party of the first part has acquired the shares of stock hereinafter described and transferred, and now holds the same for the benefits of the shareholders of The Great Northern Railway Company; and

WHEREAS, By contract between the party of the first part and said railway company, bearing date the 20th day of October, A. D. 1899, the right is reserved to said railway company to authorize or direct, by resolution of its Board of Directors approved by its stockholders, a transfer of said shares of stock by said party of the first part; and

WHEREAS, The said Board of Directors, at a meeting duly held on the 14th day of November, A. D., 1906, did, by resolution, authorize and direct the said party of the first part to enter into this agreement and make the tranfer herein made, upon the terms and conditions herein set forth, which resolution has been approved by the stockholders of said railway company at an adjourned annual meeting held on the 19th day of November, A. D. 1906,

NOW THEREFORE, The party of the first part doth hereby assign, transfer and set over unto the parties of the second part, hereinafter called the "trustees", and to the survivors and survivor of them, and to their successors in the trust herein created, and to their assigns, all and singular the following described personal property, to-wit:

Seven hundred and fifty (750) shares of the par value of One thousand dollars ($1000.00) each of the capital stock of the West Missabe Land Company, Limited; Five thousand eight hundred and seventy-nine (5879) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the North Star Iron Company; One thousand (1000) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Leonard Iron Mining Company; Five hundred (500) shares of the par value of One Hundred dollars ($100.00) each of the capital stock of the Tyler Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Harrison Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Jackson Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Polk Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Fillmore Iron Mining Company; Five hundred (500) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Arthur Iron Mining Company, and Five (5) shares of the par value of One hundred dollars ($100.00) each of the capital stock of the Van Buren Iron Mining Company.

TO HAVE AND TO HOLD all and singular the said shares of stock, and any and all shares of stock or other property for which said shares or any of them may at any time be exchanged, or which may at any time accrue to the shareholders of said companies or any of them, or of the successors of any of them, whether by reason of the dissolution of any such company or for any other cause, with all and singular the rights and powers of shareholders in respect thereof, and full power of sale or other disposition thereof, as hereinafter provided, to said trustees, and the survivors or survivor of them, and their said successors and assigns.

IN TRUST, HOWEVER, to hold, use and dispose of the said property and all income and proceeds thereof, upon the trust herein expressed, for and during the lives of the following named persons and the life of the last survivor of them, and for and during the twenty (20) years next following the death of such last survivor, unless said trust shall be sooner determined, the names and description of said persons upon whose lives the duration of said trust is limited, being:

Louis Hill, James Jerome Hill and Cortlandt Hill, sons of Louis W. Hill, of St. Paul, Minnesota; George Norman Slade, son of George T. Slade, of said St. Paul; Francis John Ward and Lawrence Ward, sons of Frank E. Ward, of said St. Paul; Walter Jerome Hill, son of James J. Hill, of said St. Paul; Thayer B. Farrington and John D. Farrington, sons of Robert I. Farrington, of said St. Paul; Howard Elliott, Jr., son of Howard Elliott, of said St. Paul; Jule M. Hannaford, Jr., and Foster Hannaford, sons of Jule M. Hannaford, of said St. Paul; Payne Whitney, of New York City; George F. Baker, Jr., son of George F. Baker, of New York City; Samuel Thorne, Jr., son of Samuel Thorne, of New York City; Robert L. Bacon, Gaspar C. Bacon and Elliott C. Bacon, sons of Robert Bacon, of Washington, D.C.

1. The trustees hereunder shall, while holding said shares of stock or any of them of any of such corporations, use and exercise their powers as such shareholders to preserve the existence and the organization of such corporation, and to secure at all times proper management of the property and business and affairs of such corporation.

2. Said trustees shall, at all times, while holding said shares or any of them or any property subject to this trust, collect and receive all dividends declared upon such shares, and all other income or profits or other moneys that may accrue to them, or to which they may become entitled as holders of such shares or other property.

3. Said trustees shall, out of the moneys so received by them, or out of the proceeds of any sales made by them of any of said shares, pay all expenses of said trust, including taxes, if any, and the compensation hereinafter provided to themselves as trustees. And in no event shall they have recourse to the certificate holders mentioned for the payment of any part of such expenses or payments or any liability incurred by said trustees.

4. After payment made of or provision made for the expenses of said trust, the said trustees shall, from time to time, and at least once in every year, distribute and pay such portion of the net income or proceeds of the property held by them as such trustees, as they may deem proper to be so distributed, among and to the persons appearing as shareholders of the Great Northern Railway Company, registered as such upon its books at the close of business on the 6th day of December, A.D. 1906, and to their assigns, under and by virtue of assignments made in accordance with the provisions therefore hereinafter contained.

5. The interest of the persons made beneficiaries under said trust shall consist of One million five hundred thousand (1,500,000) equal shares, each original beneficiary being entitled to receive the number of shares, and a certificate therefor, as hereinafter provided, in said trust equal to the number of shares of stock of the Great Northern Railway Company registered at the date last aforesaid in his name as the holder thereof on the books of said company.

A list of said original beneficiaries showing their respective names and addresses, and the number of shares to which each is entitled under said trust, signed by the chairman of the party of the first part and by the parties of the second part hereto, is appended to this instrument.

6. The interest of each and every beneficiary under said trust is and shall continue to be limited to the right to receive his proportional share or dividend in such distributions as shall, from time to time, have been determined on and declared by said trustees as hereinbefore provided.

7. The trustees shall cause to be prepared certificates of beneficial interest under said trust, which shall be identical in form, but may be of several series, according to the respective denominations thereof. The certificates of each series shall bear their proper serial designation and shall be numbered consecutively from one upward. Each certificate shall state the proportional interest or number of shares to which the person named therein is entitled under said trust, and such interest shall be assignable only by the person named therein and registered as holder thereof on the books of the trustees, by transfer in writing in person or by his duly authorized attorney, and upon surrender of the certificates representing such interest.

Such assignment may be of all, or any number less than all, of the shares represented by such certificate, but not of any fraction of a share. Nor shall any fraction of a share be represented by or included in any of said certificates.

8. Upon the issue of any certificate the trustees shall enter the same in a book or books to be kept by them for that purpose, such entry to show the number and date of such certificate, the number of shares represented thereby, the name of the person entitled to said shares, his residence or address as given to them on the issue of such certificate, or from time to time thereafter, and such other matters as the trustees may deem proper.

And no person not so registered shall be deemed a certificate holder or entitled to any beneficial interest under said trust.

And all dividend cheques, reports, notices or other communications sent by mail, postage prepaid, to any registered holder at such registered address, or to an agent or attorney for the purpose by such holder at the address given therefor by such holder, shall be equivalent to a personal delivery to such holder of the matter so sent.

The trustees shall, by writing recorded in the record of their proceedings, appoint a corporation Registrar of Transfers who shall countersign and enter in a register to be kept by it for the purpose each and every certificate issued by the trustees. Such registry shall show the number and date of each certificate, the number of shares represented thereby and the name of the owner, as recorded on the face thereof. When any certificate shall be in any manner canceled the Registrar shall make a detailed entry thereof in said register. No certificate shall be valid unless countersigned by the Registrar.

The trustees may, in their discretion, by writing recorded in the record of their proceedings, appoint a transfer agent or agents, who shall make transfers of certificates, and who

shall keep a record of all certificates issued or canceled through their agency, and shall countersign each and every certificate so issued. No certificate so issued shall be valid unless so countersigned.

The trustees or any of them may, by writing recorded in the record of their proceedings, appoint agents or attorneys who shall sign certificates on his or their behalf and in his or their names as such trustees.

The trustees may, at any time, by writing recorded in the record of their proceedings, remove any such registrar of transfers, transfer agent or other agent or attorney and appoint another in his place.

9. The trustees shall have full power, during the continuance of this trust, to sell at public or private sale, or exchange for other property, or otherwise dispose of all or any part of the shares of stock hereby transferred to them, or any other property that may have become subject to this trust; and to invest the proceeds of any such sale or sales in other property; and in case of such re-investment the property so acquired, as well as all property acquired by the trustees in exchange, or otherwise, for property held by them under this trust, shall be held by the trustees under the same trust and with the same powers and duties in respect thereto as are hereby provided in respect to the property herein described and conveyed.

10. The trustees are hereby empowered to hire such suitable offices and employ such clerks, attorneys, mining engineers and other agents or other persons as they may deem requisite for the proper execution of this trust, and all such expenses and all others incurred by them in the execution of the trust shall be a prior charge thereon to be paid or provided for before divisions of income or other moneys among the certificate holders.

11. The trustees shall keep books of account of their receipts and expenses and business transactions in the execution of such trust, and a record of their own proceedings at their meetings.

They shall make an annual report of their receipts and disbursements, and of the condition of the trust, a copy of which report shall be sent to each certificate holder.

12. Any trustee may at any time resign his trust by writing signed by him and delivered to the remaining trustees or trustee, accompanied by a proper transfer and release of his title to and interest in the trust property. In case of the death or resignation of any trustee the vacancy thereby created shall be filled by the remaining trustees or trustee by resolution and appointment in writing, recorded in the book of record of their proceedings. If at any time there should be but a single trustee remaining, he shall first appoint one trustee, and those two shall appoint a third. If at any time there should be no trustee existing or capable of acting, the Board of Directors of the Great Northern Railway Company, or of such corporation if any as shall then be the successor of that company, may appoint one or more trustees.

When any trustee shall become unable to act by reason of illness, absence, or other cause, the other trustees, after first making a record of such fact in the minutes of their proceedings, shall have and may exercise all the powers herein conferred upon all the trustees.

Any trustee may from time to time, by power of attorney duly executed, delegate his powers for a period not exceeding twelve (12) months at any one time to the other trustees or to either of them, and every such power of attorney shall be recorded in the record of the proceedings of the trustees.

13. The trustees shall organize and choose one of their number president, and in case of vacancy in that office shall

elect one of their number to fill such vacancy. The president shall be the active manager and executive officer in carrying on the business devolving on the trustees. Until the gross income of the trust shall equal Five million dollars ($5,000,000.00) in any one year, he shall receive a compensation of Twenty-five thousand dollars ($25,000.00) per annum. And in each year thereafter he shall receive, in addition to the said sum of Twenty-five thousand dollars ($25,000.00) a sum equal to one per cent of the excess of the gross income of the trust for that year over Five million dollars ($5,000,000.00) until his annual compensation shall reach the sum of Fifty thousand dollars ($50,000.00), at which amount it shall remain without further increase.

The trustees may, from time to time, by writing recorded in the record of their proceedings, designate one of their number to sign dividend cheques and other cheques drawn against the trust funds, and all cheques signed by the trustees so designated shall be of the same validity and effect as if signed by all the trustees.

The compensation of each of the trustees other than the president shall be Ten thousand dollars ($10,000.00) per year.

14. The trustees, for the better accomplishment of the purposes hereof, may, from time to time, adopt rules not inconsistent with the provisions hereof for the management of said trust and the government of their proceedings, and may from time to time modify, amend or abrogate any rule so adopted.

15. The trustees shall be responsible only for wilful breach of trust, and each shall be responsible only for his own acts and defaults, and not for those of any other trustee.

16. The word "trustees", where used in this instrument, shall be deemed to mean those who may at any time be trustees hereunder.

17. Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to wind up the affairs of said trust. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall convey and transfer unto the party of the first part, or its successors, or assigns, all property, save said moneys, held by them under said trust.

And thereupon said trust shall cease.

18. The said parties of the second part hereby accept the transfer made and the trust herein expressed.

IN WITNESS WHEREOF, The party of the first part hath caused these presents to be executed, in duplicate, by its proper officers, in that behalf duly authorized, and the second parties have to each duplicate set their hands and seals the day and year first above written.

LAKE SUPERIOR COMPANY, LIMITED
By JAS. J. HILL, Chairman
Attest: LOUIS W. HILL, Secretary
LOUIS W. HILL
JAS. N. HILL
WALTER J. HILL
EDWARD T. NICHOLS

Executed in presence of:
M. R. BROWN
F. S. DALRYMPLE
(Corporate Seal)
M. R. BROWN
F. S. DALRYMPLE

ANNEX B

CONTRACT OF LAKE SUPERIOR COMPANY, LIMITED AND GREAT NORTHERN RAILWAY, OCTOBER 20, 1899

THIS CONTRACT, Entered into this *20th* day of *October*, 1899, between the GREAT NORTHERN RAILWAY COMPANY, hereinafter called the Northern Company, and the LAKE SUPERIOR COMPANY, LIMITED, hereinafter called the Superior Company, an association organized under the laws of the State of Michigan,

WITNESSETH:

I.

That stocks, bonds and properties have been transferred to the Superior Company, as follows:

[the description is here omitted]

II.

It is agreed by and between the Northern Company and the Superior Company, in consideration of the transfer of said stock, bonds and property, and as a condition thereof:

1. That the Superior Company shall not sell, transfer or assign any of such stocks, bonds or properties, nor any part thereof, without the consent of the Northern Company; and there shall be printed or stamped upon each certificate of said stocks a notice that the same is not assignable or transferable except with the approval of the Great Northern Railway Company endorsed thereon, and signed by its President or other fully authorized officer.

2. The Superior Company shall, out of the income derived from the stocks, bonds and properties so transferred, pay all taxes accruing upon the same, all necessary expenses of administration, operation, maintenance and

repair, and also the cost of acquiring any additional equipment, property or improvements.

3. After paying out of the said income, taxes, expenses of administration, operation, maintenance and repair, and the cost of acquiring additional property, equipment, and improvements, the Superior Company will, when requested by the Northern Company, pay the balance of the total income received by it on account of such stocks, bonds and properties, to the stockholders of the Northern Company as they may appear of record at the date of closing the stock transfer books of that company for some regular dividends, ratably, in proportion to their respective holdings of the Northern Company's stock. But such request for payment shall not be made until the amount of such total net profits, income or receipts shall equal at least one-half of one per cent of the amount of the stock of the Great Northern Company outstanding at the time.

The Board of Directors of the Northern Company may, by resolution approved by its stockholders, direct that such profits, income or dividends received by the Superior Company, instead of being paid out in the form of dividends to the stockholders of the Northern Company shall be used for the purpose of acquiring other property, or for such other uses or purposes and upon such terms and conditions as may be set forth in such resolution. The Superior Company agrees that it will comply with the provisions and requirements of such resolution.

4. The Northern Company may, by resolution adopted by its Board of Directors and approved by stockholders, authorize or direct the Superior Company to lease, sell, transfer or exchange the property and assets of either

or all of said companies or associations, or any part thereof, and the proceeds or receipts derived from such sale, lease or exchange shall be held by it and accounted for or disposed of as required by such resolution.

5. Upon demand of the Northern Company, made by resolution of its Board of Directors, approved by its stockholders, the Superior Company agrees to transfer the stock, bonds and properties held by it hereunder, in whole or in part, to the Northern Company, or to such other body or person as may be designated by such resolution, and that it will comply with the provisions and requirements of such resolution in that regard.

6. Action of the stockholders of the Northern Company authorized or required under the provisions of this contract shall be in the form of resolutions to be adopted at their annual meeting or at an adjournment thereof, or at some other regularly called meeting. At such meeting of the stockholders the votes of a majority of the shares of the stock of the Northern Company present and voting shall be final and conclusive as respects any matter embraced in this contract, and have the same force and effect as though owners of all the stock had been present and by their action concurred therein.

7. Copies of resolutions relating to the matters covered by this contract, adopted by the Board of Directors of the Northern Company, or by its stockholders, certified by the Secretary or Assistant Secretary of the Great Northern Railway Company to be correct, shall be delivered to the Superior Company, and it shall accept such resolution as its authority to act and shall be governed by them as respects matters coming within the provisions of this contract.

IN WITNESS WHEREOF, The parties hereto have caused this instrument to be executed by their duly authorized officers. * * *

Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term 1976
No. 76-524

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GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 11, 1976.

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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PETITION DOES NOT PRESENT QUESTION FOR REVIEW ON CERTIORARI

The Petition for Writ of Certiorari herein does not present any question cognizable by this Court on certiorari.

The proceeding herein did not involve a violation or construction of any federal statute and does not present any federal question. Confronted with that situation, the petitioners have attempted to manufacture grounds for certiorari review by this Court, by making the unsupported contention that the Minnesota Supreme Court has misconstrued the commodities clause of the Hepburn Act, 49 U.S.C. § 1(8). (Petition for Cert. 18, 19)

However, the fact is that the Minnesota Supreme Court did *not* undertake to construe the Hepburn Act. (Cert. App. 1) No violation of the Hepburn Act is alleged in the pleadings and no such issue was tried in the trial court. Consequently, there was no construction of the Act for the Minnesota Supreme Court to review.

The proceeding herein was merely a hearing on a Petition by the trustees to the Minnesota District Court of Ramsey County asking for instructions with reference to their powers and duties in administering the Trust. (App. 1) No question concerning the Hepburn Act is presented by the trustee's Petition (App. 1); no question concerning the Hepburn Act is presented by the Arms' Petition to intervene in the proceeding (App. 15); and no question concerning the Hepburn Act is presented by the District Court's Order which allowed the intervention (App. 18).

This plainly is not an action wherein the Hepburn Act or any violation thereof were either alleged or tried by the Court. Moreover, no federal question was ever raised in the trial court. Because of this fact, the Petition herein utterly fails to comply with, and is unable to comply with, the requirements of Supreme Court Rule No. 23 which states:

"The petition for writ of certiorari shall contain in the order here indicated— . . .

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised *so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis supplied.)

Petitioners' failure and inability to comply with Rule 23(f) are fatal deficiencies in the Petition that render it inadequate ". . . to give this court jurisdiction to review the judgment on writ of certiorari."

HEPBURN ACT WAS NOT AN ISSUE IN THE PROCEEDING BELOW

Although the District Court made reference to the Hepburn Act in the memorandum that accompanied its decision, (Cert. App. 45) the only references to the Hepburn Act in evidence appear in a transcript of the testimony of James J. Hill before a congressional committee in 1912 (SR-16, 17) wherein he indicated that the Hepburn Act was one of the considerations that led to the creation of the Trust. The only mention of the

Hepburn Act in the course of the trial below was a voluntary statement to the trial court by counsel for the trustees to the effect that the commodities clause of the Hepburn Act was undoubedly one of the motivating factors that induced the creation of this Trust. (Tr. 149, 167)

Clearly, the commodities clause of the Hepburn Act would have prevented the Great Northern Railway from transporting iron ore that was owned by it. Consequently, the Trust was created in 1906 to own the stock of the companies that had legal title to the ore *properties*. The trustees thus held the ultimate ownership of the iron ore *properties* in Trust, for the benefit of the certificate holders, with a reversion upon expiration of the Trust to Lake Superior Company, Limited, the settlor of the Trust. (App. 4)

Thus, the Great Northern Railway had no interest whatsoever in the ore *properties* and certainly none in the iron ore to be transported. This was a perfectly legal and proper arrangement that made it possible for the Great Northern Railway to have an opportunity to transport the ore and obtain freight revenues without any violation of the commodities clause.

The only reference made to the Hepburn Act by the Minnesota Supreme Court is the following:

> "The Commodities Clause of the Hepburn Act, now 49 USCA, (sic) § 1(8), upon which the court particularly focused, prohibits a railroad from carrying ore mined or produced by it or under its authority or in which it may have any interest, direct or indirect. It is not clear that immediately after the creation of the trust in 1906 Great Northern's carriage of ore mined from the trust properties would have violated the Hepburn Act, for it is not clear that it would have been deemed to have any interest

> in the ore. It was not until 1913 that the railroad acquired Lake Superior's interest in the Trust, and we are not prepared to say that this transfer 7 years later is controlling in ascertaining the intent of the grantor when this trust was drawn. Even if the carriage of the ore were held to be illegal, moreover, it does not follow that this alone would render invalid what is an otherwise valid provision in this trust." (Cert. App. 9)

NEITHER THE TRUST NOR THE RAILROAD HAS ANY INTEREST IN THE ORE SHIPPED IN INTERSTATE COMMERCE

The Great Northern Iron Ore Trust does not engage in mining operations. Rather, it leases the ore properties to mining companies on long term mining leases. Consequently, the Trust does not own or have any interest in the iron ore when it is shipped in interstate commerce.

A lease of mining properties is unlike an ordinary lease that merely gives the lessee possession, use and enjoyment of the demised premises. A mining lease gives the lessee the right to take and remove all of the ore that can be extracted from the premises during the term of the lease. It is in reality a sale of all of the ore that the lessee can mine during the term of the lease at the royalty rate prescribed in the lease. Clearly, the "sale" of each ton of ore mined is completed upon its delivery.

By the time each ton of ore is placed in a railroad car for transportation, delivery has been accomplished, title is complete in the lessee mining company and the Trust has no remaining interest "direct or indirect" in that [illegible]e. It is at this same point in time that the iron ore first becomes an "article or commodity" that is capable of being transported in inter-

state commerce and it is then owned absolutely by the lessee mining company.

It is obvious that the ore *properties*, the lands from which the ore is extracted, are not "articles or commodities" that are susceptible of being shipped in interstate commerce. Consequently, even after the Great Northern Railway acquired Lake Superior Company's reversionary interest in the Trust in 1913, seven years after the Trust was created, it did not acquire any interest "direct or indirect" in any "article or commodity" that was capable of shipment in interstate commerce. Moreover, the railroad has never had "any interest direct or indirect" in the royalties that have been received by the trustees and distributed to the certificate holders.

The Hepburn Act has no prohibition on ownership of mines or other properties. It merely prohibits a railroad from transporting in interstate commerce "any article or commodity. . . manufactured, mined, or produced by it, or under its authority, or in which it may have any interest, direct or indirect . . .". No question involving the Hepburn Act can occur until such time as the Burlington Northern railroad comes into possession of the ore properties, and then, only if it should transport over its own lines ore which it mines itself or in which it has an interest. The language of the Hepburn Act does not prevent Burlington Northern from coming into possession of a reversionary interest—it will only prevent Burlington Northern from transporting ore over its own lines if it has a proscribed interest in the ore.

CONCLUSION

There is no issue involving the Hepburn Act that is presented by this case and no issue presented for judicial review on certiorari.

Respectfully submitted,

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FILED
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MICHAEL RODAK, JR., CLERK

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ARMS REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

Supreme Court of the United States

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ARMS REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Three points destroy the argument by which Respondents hope to escape review:

1. The Railroad and, strangely, ***even the Trustees*** (in violation of their duty to the certificate holders, for whom they are trustees) **urge a reading of the Commodities Clause** of the Hepburn Act that growing numbers of Justices of this Court have rejected in the cases the Railroad now cites.

In every appearance of the Commodities Clause in this Court the view expressed by the first Mr. Justice Har-

lan in dissent in *United States v. Delaware and Hudson Company* (1909), 213 U.S. 366, has gained adherents—until now they are eight, namely: Justices Harlan, Stone, Brandeis, Cardozo, Rutledge, Black, Douglas and Murphy. Mr. Justice Harlan put the issue this way:

> "In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally *or equitably*, of stock—certainly, if it owns a majority or all the stock —*in the company which mined,* manufactured or produced, and then owns, the coal which is being transported by such railroad company. *Any other view* of the act will enable the transporting railroad company, *by one device or another, to defeat altogether the purpose which Congress had in view,* which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal."* (213 U.S. at 419)

The Railroad and the Trustees read out of the statute the prohibition barring *"any"* interest, *"direct or indirect"* in the Railroad. The Minnesota Supreme Court has adjudged the railroad that hauls the ore *does* have an interest in these ore lands, establishing either violation of the statute or erosion of it to nothing.

What is accomplished by the argument of the Railroad and the Trustees is not only to despoil the 10,000 certificate holders of the right to come into possession of these vast iron ore lands, and, perhaps worse, stake out so easy a route around the statute that it were better the statute be repealed altogether rather than left an empty promise to the public.

---

*Emphasis supplied throughout.

2. The Commodities Clause is squarely in issue. The pretense of the Trustees and the Railroad that the Commodies Clause is not in issue is destroyed by the Minnesota Supreme Court's opinion pointing out it was the Commodities Clause "upon which the court particularly focused * * *." (See page 4 of the Trustees' Brief and Cert. App. 9.)

The Commodities Clause issue is here on the authority of *Raley v. Ohio* (1959), 360 U.S. 423, where the Court ruled:

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." 360 U.S. at 436.

3. The Railroad is inescapably in violation of the Commodities Clause for it is on both sides of the transaction. The Railroad hauls the ore. It plays the leading role in setting the freight rates at which the ore is hauled.

In addition, the Railroad has insisted upon, and has regularly exercised, the right to pass on leases granted by the Trustees and on operating agreements thereunder.

The Trustees asked the Railroad to consent to the making of leases by the Trustees:

> "upon such terms and conditions and for such periods of time (whether or not such leases may endure for periods extending beyond the probable or actual termination of said trust) as the trustees from time to time under said trust agreement may consider necessary or proper for the orderly use and development of the trust estate." (B-N Ex. 56 a and b.)

The Railroad *refused.* It instructed the Trustees:

> "we would like to review each contract as it is prepared." (B-N Ex. 56c.)

In the period 1960 through 1971, when the Record closed, the Railroad passed on, and approved, fourteen

leases proposed to be granted by the Trustees. (B-N Ex. 56 g, o, u, v, w, x, y, gg, ll, oo, uu, zz, eee and jjj.) The Railroad's corporate records show that the Board of Directors passed on and approved five of the fourteen leases (B-N Ex. 56 l, ee, nn, ss and xx) and the Executive Committee of the Board of Directors passed on the remaining nine. (B-N Ex. 56 d, t, jj, ccc and iii.)

In view of the Railroad's meticulous supervision of the mining of the ore it hauls to market, the Railroad's pretense (Burlington Northern brief, page 7) that "the Commodities Clause is without controlling significance in the instant case" has a particularly hollow ring. Especially is this so since each time the Railroad passed on, and approved, iron ore and taconite leases and operating agreements under those leases, the Railroad's corporate minutes show:

> "The President stated that in 1899 ownership of certain property was vested in Lake Superior Company, Limited, which was a wholly owned subsidiary of this Company and which distributed income from said property to Great Northern shareholders. *As a result of the enactment of a law in 1906* forbidding, after June 1, 1908, the shipment by a railroad over its own lines of any articles or commodities owned by it except those for its own use, *iron ore properties then held by Lake Superior Company, Limited, were,* by trust agreement dated December 7, 1906, *put into trust for the benefit of Great Northern shareholders* to whom transferrable certificates of beneficial interest were issued, said trust being known as Great Northern Iron Ore Properties." (B-N Ex. 56 d, m, t, ff, kk, tt, yy, ddd and ggg.)

The Railroad, under the Minnesota Supreme Court decision, has a *direct* interest in the ore in place and a *controlling voice* in determining royalties and the conditions under which the ore it hauls is to be severed from the earth and turned over to it for transport.

This power the Railroad has exercised to the point of *requiring* the lessee, as a *mandatory requirement* (T 553), to ship the ore over the Railroad. Although the Trustees claim to have abandoned that requirement (Arms Ex. 64, page 3, Question 3), Frank Claybourne, counsel for the Trustees, in response to inquiry (T 544) said he had searched the leases and that some leases, running into the 1990's, "still contain that traffic clause * * *." (T 546)

And, in the "Memorandum of Trustees on Order to Be Made" submitted to the trial court on August 1, 1973, the Trustees urged upon the trial court (page 4):

> "In view of the grantor's interest *in retaining the traffic for Great Northern* railway and the fact that the first holders of certificates of beneficial interest were also stockholders of the railway company, *the Trustees have properly assisted such allocation of the traffic* without reducing the royalties payable by the lessees.
>
> These two objectives *have been served up to this date. The traffic has in fact been over the Great Northern Railway,* with no reduction of royalty. For the seven years from 1899 thru 1906, prior to the Commodities Clause of the Hepburn Act which precipitated the Trust, the Great Northern Railway, including its stockholders, received directly the benefit of both royalties and traffic.
>
> The present controlling intent is the managing of the Trust as a business mining venture *just as the railroad would have done* if there had been no traffic 'problem'."

The case deserves the attention of the Court.

Respectfully submitted,

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